89- 1658

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1989

JAMES M. DOMBROSKI,
Petitioner,

vs.

GEORGE PEABODY and CITIZEN'S RIGHT OF WAY DEDICATION AT PUKOO COMMITTEE,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether, on review of a trial court ruling imposing severe sanctions on an attorney for allegedly filing an unmeritorious removal petition, an appellate court is precluded by 28 U.S.C. §1447(d) from considering the attorney's contention that removal was proper. If so, does application of Section 1447(d) in these circumstances deny due process?

2. Whether an appellate court that disapproves most of the grounds upon which a trial court relied in imposing sanctions should return the matter to the trial court for reconsideration of the penalty. Does an affirmance by the appellate court without doing so deny due process?

3. Whether an attorney is entitled to an evidentiary hearing before a trial court can impose a penal sanction—suspension or disbarment—for his having acted in subjective bad faith.

4. Whether an attorney can be sanctioned for filing a pleading that satisfies the first prong of Rule 11—it *is* well grounded in fact and warranted by existing law—but fails the second prong—it may have been filed for an improper purpose.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were: George Peabody, Citizen's Right of Way Dedication at Pukoo Committee, the Maud van Courtlandt Hill Schroll Trust, the State of Hawaii, August K. Duvachelle, Sophie M. Duvachelle, the United States of America, Department of the Army, Alfred J. Thiede, and James M. Dombroski.

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit

Petitioner James M. Dombroski respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit filed on September 5, 1989, as amended on January 23, 1990.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit, reported at 892 F.2d 772 (9th Cir. 1989), is set out in Appendix A to this petition. The original Ninth Circuit opinion is unreported, and appears in Appendix B. The 1988 decision of the district court is unreported, and is reproduced in Appendix C. The district court's order denying an application to stay the 1988 decision is unreported, and is reproduced in Appendix D. The 1987 decision of the district court is unreported, and is reproduced in Appendix E.

JURISDICTION

The judgment of the court of appeals was filed on September 5, 1989, and amended on denial of petition for rehearing on January 23, 1990. On February 7, 1990, the court of appeals stayed issuance of its mandate through February 22, 1990, pending the filing of this petition for a writ of certiorari; the court later denied motions to extend the stay of mandate through April 23, 1990.

This Court has jurisdiction under 28 U.S.C. §1254(1). The court of appeals had jurisdiction under 28 U.S.C. §1291.

PROVISIONS OF LAW INVOLVED

Federal Rule of Civil Procedure 11 provides in part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or a needless increase in the cost of litigation.

28 U.S.C. §1441(b) provides in part:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

28 U.S.C. §1447(d) provides in part:

> An order remanding an action to the State court from which it was removed is not reviewable on appeal or otherwise . . .

STATEMENT OF THE CASE

This is an appeal from a trial court order (1) imposing monetary sanctions on, (2) suspending the right to practice law of, and (3) recommending the permanent disbarment of attorney James M. Dombroski. The trial court imposed these harsh sanctions on Dombroski because he purportedly improperly removed this action from state to federal court. On appeal, the Ninth Circuit expressly reversed most of the trial court's *reasons* for imposing sanctions, but nonetheless affirmed the severity of the penalty. Dombroski seeks a writ of certiorari to review that judgment.

A. Factual Background.

The underlying action involved a claimed public right of access to a lagoon in Hawaii. Pukoo fishpond was an ancient fishpond located on the southeastern shore of the island of Molokai, Hawaii. Centuries ago, native Hawaiians used the fishpond to catch and breed fish. *See* App. A at A3. Over time, the fishpond fell into disuse.

In the 1970's, the fishpond's then-owner, Canadian-Hawaiian Developers, decided to develop a hotel and condominium resort on the property surrounding the fishpond, and to convert the fishpond into a cloverleaf-shaped lagoon and beach, by dredging and filling operations. *See id.*

To that end, Canadian-Hawaiian sought a dredging permit from the United States Army Corps of Engineers for permission to dredge an offshore reef beneath the public waters of the Pacific Ocean. The Corps granted the application for a dredging permit, but conditioned issuance of the permit on Canadian-Hawaiian's allowance of "the full and free use by the public of all navigable

waters at or adjacent to the structure or work authorized by this permit." Canadian-Hawaiian completed its offshore dredging work, and later dredged the fishpond itself to create Pukoo Lagoon. *See id.*

In 1980, the Maud van Cortlandt Hill Schroll Trust ("Schroll Trust") bought Pukoo Lagoon. To preserve the Lagoon, the Schroll Trust cancelled the condominium development plans. *See id.*

On September 21, 1983, plaintiffs-respondents George Peabody, a commercial charter boat operator, and Citizen's Right of Way Dedication at Pukoo Committee (collectively, "Peabody"), filed their original complaint in Hawaii state court. The complaint alleged three causes of action, all of which sought public access to Schroll Trust property. *See id.* at A4.

Only Count I is relevant here. That Count alleged certain rights of access over water into the interior waters of Pukoo Lagoon. Count I did not specify whether those alleged rights of access arose under state or federal law. *See id.* at A4-5. Thus, on the one hand, Count I could be read to claim a *federal* common law right of water-to-water access to the "navigable waters" of Pukoo Lagoon. On the other hand, Count I could be read to claim a *state* law right of access to the waters of the Lagoon on behalf of the public as "third party beneficiaries" of the permit issued by the Army Corps of Engineers to Canadian-Hawaiian.

On December 23, 1983, the Schroll Trust removed this action to the federal district court, on the basis of federal question jurisdiction. The case remained in the federal court, without challenge by plaintiff Peabody, for almost four years. The federal trial was set to begin on June 23, 1987. On June 10, 1987, Peabody filed a motion to remand for lack of federal jurisdiction. *See id.* at A4.

As to Count I, Peabody argued that no federal claim was pled because he viewed "this action as a contractual issue." Peabody argued: "The permit issued by the Corps of Engineers to Canadian-Hawaiian specifically intended that the public benefit from the contract. The public was a named class of beneficiaries. Plaintiffs Peabody and CROWD are members of the class of beneficiaries." Peabody argued that Count I alleged "merely a matter of state law which controls its disposition, since contractual obligations are dealt with under state law."

The trial court accepted this position and remanded the case to state court on July 10, 1987. *See id.* at A5; App. E. That ruling governed unless Peabody later decided to pursue a federal claim in Count I.

On February 27, 1988, Peabody filed a "Motion for Partial Summary Judgment as to Count I." Those motion papers urged that the waters inside Pukoo Lagoon were "navigable" and subject to a *federal* navigational servitude providing public water-to-water access to the Pukoo Lagoon. *See* App. A at A9. Citing *Kaiser Aetna v. United States,* 444 U.S. 164 (1979), Peabody urged that the federal common law governing interpretation of the Army Corps of Engineers' permit created a public right-of-way from the ocean to all navigable waters within the Pukoo Lagoon.

If Peabody's summary judgment papers were a "motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable," 28 U.S.C. §1446(b), Schroll Trust had thirty days after receiving the summary judgment papers within which to remove this action again. On March 14, 1988, Schroll Trust removed this case alleging, among

other grounds, that this action was removable because Count I presented a "case arising" under federal law. *See id.* at A9.

Peabody responded with motions to remand and for sanctions. He urged that Schroll Trust had improperly removed the case "[i]n an obvious effort to avoid the March 28, 1988 [state court] trial date." He argued that Count I was, in fact, a state law claim and that Schroll Trust filed its petition for removal frivolously and for purposes of delay. Finally, he asked the district court to impose sanctions on the Schroll Trust and its attorney. *See id.* at A5.

B. The District Court Decision.

The trial court was convinced; it rejected each of Schroll Trust's arguments seriatim. Among other things, the trial court held that "removal was not timely" and that "there is no federal question." App. C at A47. It "found many, if not most of" Schroll Trust's arguments "frivolous," *id.*, and thus remanded the case to state court. *Id.*

The trial court went on to impose sanctions on attorney James M. Dombroski, counsel for the Schroll Trust. Under Federal Rule of Civil Procedure 11, the trial court imposed monetary sanctions of $7,834.50 on Dombroski because "[t]he manner and timing of Mr. Dombroski's removal, and the removal itself ... constitutes sanctionable conduct." *Id.* at A50.

In addition to the Rule 11 sanctions, the trial court imposed sanctions under its "inherent" authority to sanction lawyers appearing before it. The trial court found that Dombroski had "removed this action from state court in bad faith for the purpose of delaying trial and harassing plaintiffs." *Id.* at A55. The trial court

further found that federal courts in Hawaii had twice before imposed monetary sanctions on Dombroski. Reasoning that "monetary sanctions alone are not fully effective in deterring Dombroski," the trial court invoked its inherent authority to suspend Dombroski's right to practice before the United States District Court for the District of Hawaii "for a period of not more than six months, pending the report of an ad hoc Committee on Discipline. The Court will appoint this ad hoc committee pursuant to Local Rule 110-6(b) to consider the question of whether Mr. Dombroski should be permanently disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the court may deem proper." *Id.* at A56.

Dombroski did not appeal from the remand order, but he did appeal from that part of the trial court order imposing sanctions.

C. Dombroski's Argument On Appeal.

Dombroski raised two arguments on appeal—one substantive and one procedural.

First, he urged that he had properly removed this case. He argued that Peabody's summary judgment papers introduced a federal question and thus renewed Schroll Trust's right to remove. Dombroski acknowledged that similar summary judgment papers had been filed earlier in the case, in federal court. Relying on *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062 (9th Cir. 1979), however, Dombroski urged that those earlier papers had not created federal jurisdiction. Only the later introduction of the federal claim in *state* court could trigger the right to remove.

Dombroski also objected to the procedure by which the trial court had imposed sanctions. His argument was grounded in due process. Among other things, he urged

that he had never before been sanctioned by federal courts in Hawaii. In one of the cases relied on by the trial court, Dombroski's client had been sanctioned for recanting his testimony at trial; Dombroski "was *not* sanctioned *personally*" in that case. App. D at A58 (emphasis altered).

In the second case, a magistrate had in fact sanctioned Dombroski $1,000 in a discovery-related dispute. Dombroski appealed that sanction to the trial court—the same trial court hearing this case. The trial court affirmed the magistrate's sanction in the discovery dispute at *exactly* the same time (10:55 a.m. on May 9, 1988) that it was entering the sanctions order in this case. Dombroski thus urged that he had been denied due process when the trial court relied on a later-decided case to increase the severity of the sanction for his purportedly improper removal.

D. The Ninth Circuit Decision.

On September 5, 1989, a panel of the Ninth Circuit affirmed the district court order imposing sanctions. Initially, the Ninth Circuit rejected virtually all of the trial court's *reasons* for imposing sanctions. Thus, where the trial court held that "[r]emoval was *not timely,*" the Ninth Circuit held that "Dombroski's Petition For Removal was *not un*timely." *Compare* App. C at A47 *with* App. B at A20 (emphasis added). Similarly, where the trial court held that "[t]here is no federal question," the Ninth Circuit held that plaintiffs "may have intended to invoke federal common law." *Compare* App. C at A47 *with* App. B at A21.

Nonetheless, the Ninth Circuit affirmed the award of sanctions. The court noted that it had "jurisdiction under 28 U.S.C. §1291 (1982) to review the imposition of

sanctions because the order appealed from is a final order and the appeal was timely." App. B at A18. The court simultaneously recognized that "any review of the underlying remand order, however, is barred [by] 28 U.S.C. §1447(d) (1982)." *Id.* The court then extended the prohibition on appellate review of remand orders to insulate the *sanctions* award from review. The Ninth Circuit held that the award of sanctions was not reviewable because review of the sanctions might incidentally reveal that the unreviewable remand order was wrongly decided. Thus, if the Ninth Circuit "were assiduously to address [Dombroski's] argument, we would be required impermissibly to review an order remanding a case to state court." App. B at A18.

To avoid that result, the Ninth Circuit would "not now independently consider the Motion for Partial Summary Judgment and decide whether, contrary to his representations, Peabody had altered his case to rely on federal law .... [W]e may not conduct this type of review." App. B at A21. Thus refusing to consider the key proposition in Dombroski's argument in favor of removal, the Court affirmed that Dombroski's conduct was sanctionable. *Id.* at A23.

The Ninth Circuit also affirmed the severity of the penalty imposed. The panel realized that the district court had taken "note of two other cases in which Dombroski had been sanctioned," and that Dombroski "argues that the court's reliance on these earlier sanctions was improper." *Id.* at A23. But the Ninth Circuit refused to "determine whether these previous sanctions were properly considered." *Id.* Rather, the court found "sufficient support elsewhere for the court's action in suspending Dombroski," *id.*, and affirmed the amount of the sanction on that alternative ground. The

Ninth Circuit did not remand for the trial court to reconsider the severity of the penalty in light of the trial court's many legal errors, but instead simply affirmed the trial court order. *Id.* at A25.

E. The Amendment On Denial Of Rehearing.

On September 21, 1989, Dombroski petitioned for rehearing or rehearing en banc. On January 20, 1990, the Ninth Circuit issued an order correcting a factual statement and deleting an inaccurate footnote from its original opinion, but denying rehearing or rehearing en banc. *See* App. A at A2.

REASONS FOR GRANTING THE WRIT

This case warrants this Court's immediate review because it raises four distinct questions, all of which have generated conflicts among the circuit courts of appeals.

I. THE DECISION BELOW DEEPENS A CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS OVER WHETHER AN APPELLATE COURT CAN ASSESS AN OTHERWISE UNREVIEWABLE ISSUE WHEN REVIEWING AN AWARD OF SANCTIONS.

Dombroski's main argument against sanctions was that when plaintiffs filed their motion for summary judgment making clear they intended to pursue a federal claim in state court, the defendants properly removed. The Ninth Circuit refused to consider this argument: "we may not now independently consider the Motion for Partial Summary Judgment and decide whether, contrary to his prior representations, Peabody had altered his case to rely on federal common law. . . . [W]e may not conduct this type of review." App. A at A9. *See also id.* at A7 ("If we were assiduously to address his argument, we would be required impermissibly to review an order remanding a case to state court."). This holding deepens a split among the circuit courts over whether an appellate court can assess an otherwise unreviewable issue when reviewing an award of sanctions.[1]

[1] Although this case involves the prohibition of review of remand orders effected by 28 U.S.C. §1447(d), the same reasoning will apply in every case where sanctions are awarded in conjunction with a second, unreviewable order. Other statutes barring or limiting appellate review include 28 U.S.C. §1334(c)(2) (decision to abstain from hearing state law claim in bankruptcy), 28 U.S.C. §2253 (certain habeas corpus proceedings), 28 U.S.C. §1915(a) (certain in forma pauperis appeals), and 28 U.S.C. §158 (not authorizing appeals "by allowance" in bankruptcy and thus effectively barring appellate review of certain final bankruptcy orders).

Although Dombroski believes the Ninth Circuit approach is mistaken, the court is not alone in holding its view. The Sixth Circuit agrees with the Ninth that reviewing an award of costs imposed in conjunction with a remand order is impermissible because reversing that award "would in effect be reviewing that which defendant concedes is unreviewable—the District Court's order of remand itself." *Bucary v. Rothrock*, 883 F.2d 447, 449 (6th Cir. 1989). The Sixth Circuit, like the Ninth, will not engage in "implicitly reviewing and rejecting the District Court's order to remand." *Id.*

Other circuits reject the Sixth and Ninth Circuits' approach. Those circuits correctly realize that "[a]lthough 28 U.S.C. §1447(d) precludes our review of the order of remand, it does not shield the subsidiary issue of Rule 11 sanctions from appellate review." *Vatican Shrimp Co., Inc. v. Solis*, 820 F.2d 674, 680 n.7 (5th Cir.), *cert. denied*, 484 U.S. 953 (1987). "To the extent . . . that the plaintiff complains of the award of attorney's fees related to the removal and remand procedure, it appears that this court does have jurisdiction to review such an award." *Ballard's Service Center, Inc. v. Transue*, 865 F.2d 447, 448 (1st Cir. 1989). *Accord ITT Industrial Credit Co. v. Durango Crushers, Inc.*, 832 F.2d 307 (4th Cir. 1987); *Johnson v. Showers*, 747 F.2d 1228 (8th Cir. 1984) ("Because we disagree with the district court's determination that the case was removed improvidently, we reverse the taxation of costs against the government.").

This court should grant certiorari to resolve this conflict by reversing the judgment of the court below. It is of course true that an appellate court cannot review a remand *order*—that is, it cannot undo the action taken; it cannot reverse the remand order and require that a case be returned to federal court. 28 U.S.C. §1447(d). But, when an appeal is taken, a court *must* review an award

of sanctions imposed in conjunction with a remand order. Those appeals are as "of right"; they must be heard. 28 U.S.C. §1291; *see, e.g., In re McLinn*, 739 F.2d 1395, 1398 (9th Cir. 1984) (*en banc*).

No litigant should effectively be denied an appeal taken as "of right." But the right to complete appellate review is particularly vital in sanctions proceedings, which can ruin a lawyer's career.[2] As the Seventh Circuit recently noted, in a case involving only a small monetary sanction, "a Rule 11 violation carries intangible costs for the punished lawyer or firm. A lawyer's reputation for integrity, thoroughness and competence is his or her bread and butter. We may not impugn that reputation without carefully analyzing the legal and factual sufficiency of the arguments." *Federal Deposit Ins. Corp. v. Tekfen Construction & Installation Co., Inc.*, 847 F.2d 440, 444 (7th Cir. 1988). *See also* Petitioner's Brief in *Cooter & Gell v. Hartmarx Corp.*, No. 89-275, at 33 (argued Feb. 20, 1990).

That reasoning is far more compelling here, where Dombroski's license was at stake. "Attorney disbarment and suspension cases are quasi-criminal in character." *Matter of Thalheim*, 853 F.2d 383, 388 (5th Cir. 1988). The Ninth Circuit should have carefully considered all of Dombroski's arguments against sanctions.

This court should issue a writ of certiorari to resolve the conflict among the circuit courts of appeals over whether an appellate court can assess an otherwise unreviewable issue when reviewing an award of sanctions.

[2] The sanction here in fact ruined Dombroski's career. Upon being sanctioned by the trial court, Dombroski abandoned the practice of law in Hawaii and moved to California. He substituted out as counsel in all of his pending cases and started building a new practice in a new jurisdiction. But the punishment does not end there. Both the Hawaii and California state bars have begun investigations into this incident and will conclude their decision-making only after this case is finally resolved.

II. THE DECISION BELOW DEEPENS A CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS OVER WHETHER AN APPELLATE COURT THAT REVERSES MANY OF THE TRIAL COURT'S REASONS FOR IMPOSING SANCTIONS MUST REMAND FOR RECONSIDERATION OF THE SEVERITY OF THE PENALTY.

The court below erred by refusing to consider the key proposition in Dombroski's argument against sanctions. But it erred again when resolving the arguments it did consider. The judgment below reversed virtually all of the trial court's *reasons* for imposing sanctions, but refused to remand for a reconsideration of the severity of the penalty in light of those errors. That holding deepens a second conflict in the circuits that warrants review by this Court.

The Ninth Circuit rejected most of the reasons supporting the trial court's imposition of sanctions on Dombroski. Thus, where the trial court held that "[r]emoval was *not timely,*" the Ninth Circuit rejected that position and held that "Dombroski's Petition for Removal was *not un*timely." *Compare* App. C at A47 *with* App. A at A8 (emphasis added). Similarly, where the trial court held that "[t]here is no federal question," the Ninth Circuit rejected that position and held that plaintiffs "may have intended to invoke federal common law." *Compare* App. C at A47 *with* App. A at A9.[3]

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[3] The Ninth Circuit's finding that this case may have arisen under "federal common law" is critical. It means that Dombroski was fundamentally correct—this case could be heard in federal court. The trial court plainly would not have penalized Dombroski so severely if it had realized that this was a federal case—and only *its own mistakes* of law resulted in at least one (and possibly both) of the remand orders.

Finally, where the trial court relied in large part on Dombroski's purported recidivism to justify the amount of the sanction it imposed, the Ninth Circuit chose not to "determine whether these previous sanctions were properly considered." App. A at A11. Thus, the Ninth Circuit rejected most of the trial court's *reasons* for imposing sanctions, but nonetheless affirmed (without remand) the *severity* of the penalty.

The Ninth Circuit's approach thus echoes the Fifth Circuit decision in *Coats v. Pierre*, 890 F.2d 728 (5th Cir. 1989). There, the trial court imposed Rule 11 sanctions on a pro se litigant without considering the litigant's yearly income. The Fifth Circuit held that the trial court erred by ignoring income, which is a relevant factor. But the Fifth Circuit then simply announced a new, reduced monetary sanction, rather than remanding for a recalculation by the trial court in the first instance. *Id.* at 734.

The Seventh Circuit, however, has rejected the Sixth and Ninth Circuits' approach. *See In re Ronco, Inc.*, 838 F.2d 212 (7th Cir. 1988). There, the Seventh Circuit reversed several of the reasons underlying a trial court's imposition of sanctions. Electing to follow the more reasonable approach, the court then remanded for reconsideration of the severity of the punishment: "not all of the grounds relied upon by the district court for the imposition of sanctions were permissible under the standards of Rule 11. Accordingly, we vacate the judgment of the district court and remand the case for proceedings consistent with this opinion." *Id.* at 219-20.

Other courts have recognized the "analogy between the district court's finding of a Rule 11 violation and a finding of contempt." *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 544 (3d Cir. 1985). In

contempt cases, courts that reverse any of the *reasons* for a punishment uniformly remand for reconsideration of the *severity* of the punishment. For example, in *Nilva v. United States*, 352 U.S. 385 (1957), this Court affirmed a conviction for contempt on only one of three grounds. This Court found "that the [trial] court should be given an opportunity to reconsider petitioner's sentence in view of the fact that his conviction now rests solely on the third specification." *Id.* at 396. *See also Southern Railway Co. v. Lanham*, 403 F.2d 119, 135 (5th Cir. 1968) ("A modification of the sanction, however, ought not be made by the appellate court on review, but should be left on remand to the discretion of the trial court.").

That result is compelled by common sense. Sanctions can destroy a lawyer's career. Trial courts are thus required to "state with some specificity the reasons for the imposition of a sanction, and the manner in which the sanction was computed." *Brown v. Federation of State Medical Boards*, 830 F.2d 1429, 1438 (7th Cir. 1987). *Accord Thomas v. Capital Security Services*, 836 F.2d 866, 883 (5th Cir. 1988) (*en banc*). Determining the amount of a sanction is a matter of delicate judgment, properly placed in the trial court's discretion. When an appellate court finds that a trial court has erred in its legal reasoning, the case should be remanded for reconsideration of the severity of the punishment.

The opinion below teaches all lawyers that sanctions imposed on a *flawed* record can be affirmed on appeal, without even the safeguard of strict appellate review. This Court should grant certiorari to resolve whether courts of appeals can reverse most of the trial court's reasons for imposing a sanction, yet summarily affirm the severity of the penalty.

III. THE DECISION BELOW DEEPENS A CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS OVER WHAT PROCESS IS DUE IN "BAD FAITH" SANCTIONS PROCEEDINGS.

This Court should also grant certiorari to resolve a split among the circuit courts over what process is due an attorney whose license may be suspended or revoked as a penal sanction for bad faith conduct in litigation.

The trial court here based its most severe sanctions of Dombroski—the suspension and recommendation of permanent disbarment—on Dombroski's purported "bad faith" in removing this case. *See* App. C at A55. But the court did not hold an evidentiary hearing at which Dombroski could adduce evidence in support of his good faith.[4] In affirming that decision, the Ninth Circuit respected earlier circuit precedent. *See, e.g., In re Yagman*, 796 F.2d 1165, 1180-81 (9th Cir. 1986) (declining to find that a $250,000 monetary sanction was tantamount to a finding of criminal contempt, and thus not requiring the protections of a criminal contempt proceeding). Other circuits have similarly held that a lawyer sanctioned for his bad faith is not entitled to an evidentiary hearing. *See, e.g., Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987) (*en banc*).

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[4] On the facts here, the finding of bad faith is surely tainted by the trial court's mistaken belief that "many, if not most of" Schroll Trust's arguments in support of removal were "frivolous." App. C at A47. Indeed, the good faith motive for removal is obvious: the Schroll Trust, a non-resident property owner, preferred a federal forum when its property rights were attacked by local residents. This is a classic example of why federal trial courts were originally authorized by the Constitution.

By contrast, the ABA Standards interpreting Rule 11 suggest that "[a] hearing is ordinarily required prior to the issuance of any sanction that is based upon a finding of bad faith on the part of the alleged offender." Standard (M)(4). Following this suggestion, the Tenth Circuit has held "that when the fine is imposed as punishment, the court imposing the fine must follow the procedures required in criminal contempt proceedings. . . . In our view, those contempt procedural protections are indicated here where the fine was precipitated, in part, by plaintiff's failure to comply with a previous court order." *Cotner v. Hopkins*, 795 F.2d 900, 903 (10th Cir. 1986). Similarly, the Fifth Circuit recently affirmed an award of sanctions, which included suspension of the lawyer's right to practice, only after the trial court gave the sanctioned attorney "an opportunity to call any witnesses he wished and to take the stand himself." *Nasco, Inc. v. Calcasieu Television and Radio, Inc.*, 894 F.2d 696, 707 (5th Cir. 1990). Where, as here, a trial court sanctions a lawyer as public punishment because of his subjective bad faith, an evidentiary hearing should be required as a matter of due process. *See generally* G. Joseph, *Sanctions: The Federal Law of Litigation Abuse* 294 (1989) ("the prevailing view is that a hearing is not required before Rule 11 sanctions may issue *unless* the subjective state of mind of the alleged offender is implicated") (emphasis added).

This Court should grant certiorari to resolve the conflict over what process is due before a trial court can impose a penal sanction for a lawyer's having acted in subjective bad faith.

IV. THE DECISION BELOW DEEPENS A CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS OVER WHETHER AN ATTORNEY CAN BE SANCTIONED FOR HIS IMPROPER MOTIVE IN FILING A PROPER PLEADING.

The circuits also split over whether a lawyer can be sanctioned for filing a pleading that satisfies the first prong of Rule 11—it *is* warranted by law—but fails the second prong—it is also filed for an improper purpose. *See id.* at 184 ("There is a split among the circuits as to whether sanctions may be imposed for the filing of a meritorious paper for an improper purpose."). This Court should grant certiorari to resolve that conflict.

The Ninth Circuit suggested here that, *if* it had reviewed the merits of Dombroski's arguments, it would have found Dombroski's removal proper. Thus, the Ninth Circuit found that the removal was "not untimely" and that Peabody "may have intended to invoke federal common law." App. A at A8 & A9. A timely removal of a case arising under federal common law is proper; it asserts a position "well grounded in fact" and "warranted by existing law," as required by the first prong of Rule 11.

The Ninth Circuit simultaneously found that Dombroski violated the second prong of Rule 11—he removed for an improper purpose, "to delay an impending trial on the merits." App. A at A12. Thus, if this Court grants certiorari, it will be asked to resolve the circuit split over whether a lawyer can be sanctioned for filing a pleading that complies with the first part, but violates the second part, of Rule 11.

The Tenth Circuit has squarely held that if a pleading "*was* 'warranted by existing law or a good faith argument for the extension, modification, or reversal of

existing law,' then any suggestion of harassment would necessarily fail." *Burkhart v. Kinsley Bank*, 852 F.2d 512, 514-15 (10th Cir. 1988). *Accord Carlton v. Jolly*, 125 F.R.D. 423, 427 (E.D. Va. 1989) (A party's motives cannot "serve to make a legally and factually acceptable pleading sanctionable."); *City of Yonkers v. Otis Elevator Co.*, 649 F. Supp. 716, 736 (S.D.N.Y. 1986), *aff'd*, 844 F.2d 42 (2d Cir. 1988).

But other circuits flatly reject this position. Thus, in *Szabo Food Servs., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988), the Seventh Circuit held that merely having "an objectively sufficient basis for [a] claim is not enough. . . . Because Rule 11 has a subjective element as well, the district court must find out why Szabo-Digby pursued this litigation." Similarly, in *Cohen v. Virginia Electric & Power Co.*, 788 F.2d 247, 249 (4th Cir. 1986), the Fourth Circuit held that a plaintiff "did not act in bad faith in filing the pleading, because there was a legal basis for the claims he asserted," but a court could yet find "that the motion for leave to amend was filed for an improper purpose in violation of Rule 11."

The Ninth Circuit alone espouses yet a third view. There, the independence of the two requirements of Rule 11 turns on the nature of the pleading involved. Thus, a *complaint* that is found to be well-grounded in fact and law *cannot* be sanctioned as harassing regardless of the attorney's subjective intent. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831-32 (9th Cir. 1986). But successive *motions*, supported by law but filed for an improper purpose, *can* be sanctioned as harassing. *See Aetna Life Ins. Co. v. Alla Medical Servs.*, 855 F.2d 1470, 1476 (9th Cir. 1988). This last conflict among the circuits independently merits granting certiorari.

V. THIS COURT SHOULD, AT A MINIMUM, HOLD THIS CASE PENDING RESOLUTION OF *COOTER & GELL.*

Finally, the Court may wish to hold this case for *Cooter & Gell v. Hartmarx Corp., cert. granted,* 110 S. Ct. 275 (1989).

That case presents, among other issues, the question what standard of review applies to awards of Rule 11 sanctions. The Court in *Cooter & Gell* may hold that an appellate court should defer to a trial court's informed exercise of discretion in finding conduct sanctionable. That holding would suggest that the Ninth Circuit erred here by disapproving many of the trial court's reasons for imposing sanctions, independently reassessing the facts, and affirming the award of sanctions on alternate grounds. As the *en banc* Seventh Circuit recently opined, "[u]ntil discretion has been taken seriously in the district court and exercised conscientiously, the basis for deference is missing." *Mars Steel Corp. v. Continental Bank, N.A.*, 880 F.2d 928, 936 (7th Cir. 1989) (*en banc*).

The Ninth Circuit decision here, however, also presents conflicts in the circuits not involved in *Cooter & Gell.* Accordingly, Dombroski urges the Court to grant his petition rather than simply to hold it for *Cooter & Gell.*

CONCLUSION

For these reasons, this Court should issue a writ of certiorari to review the Ninth Circuit opinion.

Dated: April, 1990

Respectfully submitted,

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APPENDIX A

Order and Amended Opinion of the Court of Appeals for the Ninth Circuit

(Filed September 5, 1989;
Amended January 23, 1990)

FOR PUBLICATION

No. 88-2796

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE PEABODY; CITIZENS RIGHT OF WAY DEDICATION AT PUKOO COMMITTEE,
Plaintiffs-Appellees,

v.

MAUD VAN CORTLAND HILL SCHROLL TRUST,
Defendant,

and

JAMES M. DOMBROSKI,
Defendant-Appellant.

ORDER AND AMENDED OPINION

D.C. No. CV-88-170-HMF

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, District Judge, Presiding

Argued and Submitted
April 3, 1989—Honolulu, Hawaii

Before: Alfred T. Goodwin, *Chief Judge*, Procter Hug, Jr. and Thomas Tang, *Circuit Judges*.

Opinion by *Judge Goodwin*

COUNSEL

Mark Herrmann, Steinhart & Falconer, and John H. Boone, San Francisco, California, for the defendant-appellant.

William W. Ramos-Saunders, Bickerton, Ramos-Saunders & Dang, and Boyce R. Brown, Jr., Honolulu, Hawaii, for the plaintiffs-appellees.

ORDER

The opinion filed in *Peabody v. Dombroski*, No. 88-2796, slip. op. (9th Cir. September 5, 1989), is amended as follows:

1. At slip. op. 10699, in the first sentence of the first full paragraph delete the words "through its attorney, Mr. Dombroski."

2. At slip. op. 10705, delete footnote 3.

With the opinion thus amended, the panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

OPINION

GOODWIN, *Chief Judge:*

After a failed attempt to remove a case to federal court, Attorney Dombroski filed a second removal petition, presenting arguments the district court had previously rejected. The district court again ruled that the case belonged in state court, and imposed sanctions on the attorney. Dombroski appeals the sanctions.

I. *FACTS and PRIOR PROCEEDINGS*

The underlying action involved a claimed public right of access to Pukoo Lagoon, located on the southeastern shore of the island of Molokai. The lagoon was formerly a fishpond used by native Hawaiians to catch and breed fish. In the 1970s, the then-owner of Pukoo fishpond, Canadian-Hawaiian Developers ("CHD"), decided to dredge and fill the fishpond to convert it into a cloverleaf-shaped lagoon and beach for the hotel and condominium resort CHD was constructing at the site.

Pursuant to 33 U.S.C. §403 (1982), a dredging permit from the United States Army Corps of Engineers ("the Corps") was required. The Corps issued a permit conditioned on CHD's allowance of "the full and free use by the public of all navigable waters at or adjacent to the structure or work authorized by this permit." CHD completed the offshore dredging work, and later dredged the fishpond itself (for which no permit was needed) to create Pukoo Lagoon.

In 1980, the Maud Van Cortland Hill Schroll Trust ("the Trust"), defendant below, bought Pukoo Lagoon and cancelled the resort development plans. The Trust also obtained zoning downgrades for the property for the asserted purpose of preserving Pukoo Lagoon.

In September of 1983, plaintiffs/appellees George Peabody, a commercial charter boat operator, and Citizens Right of Way Dedication at Pukoo Committee (referred to collectively as "Peabody") sued the Trust in Hawaii state court. Peabody alleged three causes of action, all of which sought public access to the Trust's property.

Only Count I is relevant to this appeal. Count I alleged certain rights of access over water into the interior waters of Pukoo Lagoon. It stated in pertinent part:

> 7. The dredging and [filling] which created Pukoo Lagoon also resulted in the waters within the lagoon becoming navigable waters to which the public has a right of full and free use. Exhibit 3 hereto is an opinion letter from the Chief Counsel, U.S. Army Corps of Engineers, Honolulu District confirming that the waters within Pukoo Lagoon are navigable waters to which the public is entitled to full and free use by virtue of subparagraph (k) of dredging permit DA Permit No. 969.
>
> * * *
>
> 9. [The Trust,] as successor in interest of [CHD], is subject to the terms and conditions of DA Permit 969.
>
> 10. Plaintiffs are entitled to an injunction directing [the Trust] to cease and desist its denial of full [and] free use of Pukoo Lagoon's waters by the public.

In December of 1983, the Trust removed the action to the federal district court, alleging federal question jurisdiction. For reasons not explained, the case lay fallow in federal court for some three and one-half years. Trial was set for June 23, 1987. On June 10, Peabody moved to remand to state court.

In his Motion to Remand, Peabody asserted that Count I involved a contractual issue only. He argued that "[t]he fact that parties include the language of federal law in their contract does not transmute the [alleged] breach into one 'arising under' the laws of the United States, even though an interpretation of the language of the contract will involve an interpretation of language that is also a federal statute." On July 10, 1987, the district court granted Peabody's Motion to Remand, and decided the original grounds for removal had been shown to be inapplicable to the case.

The Hawaii state court set trial for March 28, 1988. Peabody filed a First Amended Complaint on January 11, 1988, adding neither new claims nor new parties. During the following two months, Dombroski filed in the Hawaii court a series of some seven motions for the Trust, three of which were denied, and four of which were never ruled upon. He also filed a Petition for an Extraordinary Writ with the Hawaii Supreme Court, which was summarily denied. On March 14, 1988, fourteen days before the state court trial date, Dombroski filed a Third Party Complaint in the state court against several United States Government parties, and filed a second Petition for Removal with the federal district court.

On April 22, 1988, Peabody filed his second Motion to Remand, together with a Motion for Sanctions. The district judge heard oral argument on the motions, and on May 9, 1988, entered his Order Granting Motions to Strike Third Party Complaint, to Remand Case to State Court and to Impose Sanctions ("Order Granting Remand"). The court imposed the sanctions requested by Peabody, ordering Dombroski to pay to Peabody the fees incurred as a result of the improper removal, and

suspending him from the practice of law for a period of not more than six months, pending the report of an ad hoc Committee on Discipline. The monetary sanctions were imposed against Dombroski alone, and the court specified that the Trust was not to pay any portion of them.

The underlying case is currently pending in Hawaii state court. Dombroski appeals the sanctions against him. We have jurisdiction under 28 U.S.C. §1291 (1982) to review the imposition of sanctions because the order appealed from is a final order and the appeal was timely. Any review of the underlying remand order, however, is barred. 28 U.S.C. §1447(d) (1982).

II. *DISCUSSION*

Dombroski's central argument is that sanctions against him were not warranted because his Petition for Removal was properly supported by law. If we were assiduously to address his argument, we would be required impermissibly to review an order remanding a case to state court. 28 U.S.C. §1447(d); *Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723 (1977). However, where, as here, a motion is sanctioned for being frivolous, effective review of the sanctions requires examination of the moving party's "good faith belief in the merit of a legal argument." *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830-31 (9th Cir. 1986).

Peabody's position—that we simply cannot examine the legal basis of the removal petition because that would constitute reviewing a remand order—would effectively block any appellate review of sanction awards related to removal petitions. In *Lemos v. Fencl*, 828 F.2d 616 (9th Cir. 1987), we considered two arguments challenging a sanction award for a frivolous removal. The

first was that the petition for removal was valid as a matter of law. This question, we said, could not be decided because a district court remand of a case to state court is not reviewable by the court of appeals. 828 F.2d at 617. The second argument was that the petition did not violate Rule 11 because it was not frivolous. In evaluating this argument, we did examine the legal argument on which the appellee had based his Petition for Removal. *See id.* at 618-19. We did not pass on whether the appellee's position in his Petition was correct—which would have amounted to a review of the district court's remand order—but our examination allowed us to conclude that the argument was neither "frivolous . . . [nor] legally unreasonable." *Id.* at 619.

This fine line is not one we need walk in the context of this case because we find the arguments Dombroski made in the Trust's Petition for Removal had been rejected previously by the district court. A second presentation of the same, previously rejected, theory to the same court fairly defines "frivolous." Unless Dombroski can show some relevant change subsequent to the first remand, the sanctions award was proper.

Dombroski alleges that such a change occurred. He claims that Peabody's Motion for Partial Summary Judgment made clear that Peabody was relying on a federal claim rather than a state claim, and therefore the circumstances had changed sufficiently to allow the Trust a second bite at the federal-forum apple. Peabody counters with two points: (1) the Petition for Removal was frivolous because Peabody's Motion for Partial Summary Judgment represented no change in his pleading, and (2) even if it did, the Petition was untimely. Although Peabody's second point is unavailing, his first is dispositive.

B. Frivolousness of the Petition for Removal

1. *Peabody's Motion for Partial Summary Judgment*

Dombroski argues that Peabody's Motion for Partial Summary Judgment was based solely on a federal cause of action, which occurred with Peabody's invocation of the federal common law of navigational servitudes. Therefore, he asserts, he correctly petitioned to remove the case to federal court. Reference to the Motion indicates that Peabody may have intended to invoke federal common law.[1] The Motion was, however, part of the papers filed with the district court at the time it granted Peabody's second Motion to Remand.[2] The fact that the district court granted that Motion indicates that it did not find there to be any federal claim in the case, notwithstanding the arguments of Peabody's Motion for Partial Summary Judgment. Therefore, we may not now independently consider the Motion for Partial Summary Judgment and decide whether, contrary to his prior representations, Peabody had altered his case to rely on federal common law. Such a determination would amount to a reevaluation of the district court's Order Granting Remand. Because we may not conduct this type of review, *see Lemos*, 828 F.2d at 617, we focus instead on Dombroski's Petition for Removal to answer the question whether the Petition was frivolous.

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[1] Even if Peabody intended to invoke federal common law, the Motion for Partial Summary Judgment did not rely on federal common law as its sole basis, as Dombroski asserts. It also invokes the theory that Peabody and his co-plaintiffs were third-party beneficiaries of the dredging permit issued by the Corps.

[2] Dombroski claims that Peabody specifically disclaimed reliance on federal law to support his Motion to Remand. If this is true, it would appear to provide an estoppel argument should Peabody try to proceed on a disclaimed federal ground in state court.

2. *Dombroski's Petition for Removal*

The district court reasoned that because the grounds raised by Dombroski in the second Petition for Removal were the same as those in the first Petition for Removal—grounds the court specifically rejected in its July 10, 1987, Order Granting Remand—Dombroski's Petition was frivolous. Because Dombroski's second Petition for Removal makes no argument that can be supported by the theory he presses on appeal—to wit, that Peabody's Motion for Partial Summary Judgment proceeded on a wholly federal claim—the district court correctly imposed sanctions.

Both Petitions for Removal allege that a federal question exists by reference to (1) 33 U.S.C. §403, which is the statute that authorizes the Corps to issue permits such as the dredging permit obtained by CHD [ER 49-50 & 140]; and (2) the takings clause of the fifth amendment. [ER 52 & 144-45]. Since these two arguments had been made in the first Petition for Removal, the court's July 10, 1987, Order Granting Remand renders them unavailable as *res judicata*. *See Cannon v. Loyola Univ. of Chicago*, 784 F.2d 777 (7th Cir. 1986) (dismissal of applicant's prior suits against medical schools challenging denial of her application barred subsequent action alleging that denial was unlawful under Title IX, and attorney's costs and fees were warranted), *cert. denied*, 479 U.S. 1033 (1987). Only if a change occurred in Peabody's case that would make these arguments relevant could Dombroski in good faith petition for removal. *See Fritzlen v. Boatmen's Bank*, 212 U.S. 364, 372 (1909) (if, after remand, subsequent pleadings or conduct of parties indicate cause is removable, right of removal upon second application is not controlled by the previous remand order).

On appeal, Dombroski identifies only one changed element in the case as permitting him properly to attempt to remove: the allegedly new reliance on federal common law revealed by Peabody's Motion for Partial Summary Judgment. Certainly neither of the two grounds above—33 U.S.C. §403 or the takings clause—can be justified on that basis. Furthermore, notably absent in Dombroski's second Petition for Removal is any allegation that Peabody's alleged invocation of federal common law regarding navigational servitudes confers jurisdiction under any statute other than 33 U.S.C. §403, which had already been rejected.

We conclude that the second Petition for Removal was frivolous because its basis had previously been rejected by the district court.

C. Appropriateness of Sanctions Imposed

When the district court suspended Dombroski from practice, invoking its inherent power, it took note of two other cases in which Dombroski had been sanctioned, and stated, "[I]t appears that monetary sanctions alone are not fully effective in deterring Dombroski from sanctionable conduct." [ER 258] Dombroski argues that the court's reliance on these earlier sanctions was improper. We need not determine whether these previous sanctions were properly considered, as we find sufficient support elsewhere for the court's action in suspending Dombroski.

When imposing sanctions under its inherent power to promote the orderly and just administration of its caseload, the district court must follow its own rules. *See In re Thalheim*, 853 F.2d 383, 389 (5th Cir. 1988); make a finding of bad faith, *Roadway Express, Inc. v. Piper*, 447

U.S. 752, 766-67 (1980); and afford due process, *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 916 (9th Cir. 1987).

The District of Hawaii's Local Rule 110-6 provides in part:

> (a) For good cause shown and after an opportunity to be heard, any member of the bar of this Court may be disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the court may deem proper.

Thus, the requirements of the District of Hawaii's court rule are subsumed in the due process requirement. Judge Fong recognized the need to afford due process to Dombroski, stating that "[e]xtraordinary safeguards are obviously required here." [ER 256] He found that Dombroski had "received the extraordinary measure of protection to which he is entitled." [ER 256] In support of this finding he cited the extent of the period during which Dombroski had notice sanctions might be imposed and the length and thoroughness of both Dombroski's briefs and oral argument in opposition to the sanctions. [ER 256-57]

Judge Fong also made a separate finding of bad faith. [ER 257, 252] The judge stated, "The fact that Mr. Dombroski removed this action in the face of a number of factors indicating that removal was improper and *after attempting repeatedly and without success to delay an impending trial* on the merits, demonstrates a flagrant misuse of the judicial process." [ER 252] (Emphasis added.) His mention of Dombroski's attempts to delay the trial on the merits refers to the series of undoubtedly harassing motions brought during the two months before the trial date in state court. *See supra* page 4. [A5]

A federal court's inherent power to sanction attorneys practicing before it is in general related to management of its own docket. *Cf. Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-30 (1962) (authority of a federal trial court to dismiss a plaintiff's action for failure to prosecute necessary "in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts").[3] On the other hand, we have recognized that federal courts have a broader duty to the public, as well. *Standing Comm. on Discipline v. Ross*, 735 F.2d 1168, 1170 (9th Cir.) (citing *Ex parte Wall*, 107 U.S. 265 (1883)), *cert. denied*, 469 U.S. 1081 (1984).

Here, it appears the district court was acting to further both objectives. We find no abuse of discretion in the district court's taking judicial notice of Dombroski's behaviour, whether in state or federal court, during the course of the case before it.

The judgment of the district court is AFFIRMED.

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[3] Similarly, Rule 11 sanctions can be imposed only for actions taken in federal court. *Hurd v. Ralphs Grocery Co.*, 824 F.2d 806, 808 (9th Cir. 1987).

APPENDIX B

Opinion of the United States Court of Appeals for the Ninth Circuit

(Filed September 5, 1989)

FOR PUBLICATION

NO. 88-2796

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE PEABODY; CITIZENS RIGHT OF WAY DEDICATION AT PUKOO COMMITTEE,
Plaintiffs-Appellees,

v.

MAUD VAN CORTLAND HILL SCHROLL TRUST,
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and

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OPINION

D.C. No. CV-88-170-HMF

Appeal from the United States District Court for the District of Hawaii
Harold M. Fong, District Judge, Presiding

Argued and Submitted
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Before: Alfred T. Goodwin, *Chief Judge,* Procter Hug, Jr. and Thomas Tang, *Circuit Judges.*

Opinion by Judge Goodwin

OPINION

GOODWIN, *Chief Judge:*

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I. *FACTS and PRIOR PROCEEDINGS*

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> 10. Plaintiffs are entitled to an injunction directing [the Trust] to cease and desist its denial of full [and] free use of Pukoo Lagoon's waters by the public.

In December of 1983, the Trust, through its attorney, Mr. Dombroski, removed the action to the federal district court, alleging federal question jurisdiction. For reasons not explained, the case lay fallow in federal court for some three and one-half years. Trial was set for June 23, 1987. On June 10, Peabody moved to remand to state court.

In his Motion to Remand, Peabody asserted that Count I involved a contractual issue only. He argued that "[t]he fact that parties include the language of federal law in their contract does not transmute the [alleged] breach into one 'arising under' the laws of the United States, even though an interpretation of the language of the contract will involve an interpretation of language that is also a federal statute." On July 10, 1987, the district court granted Peabody's Motion to Remand, and decided the original grounds for removal had been shown to be inapplicable to the case.

The Hawaii state court set trial for March 28, 1988. Peabody filed a First Amended Complaint on January 11, 1988, adding neither new claims nor new parties. During the following two months, Dombroski filed in the Hawaii court a series of some seven motions for the Trust, three of which were denied, and four of which were never ruled upon. He also filed a Petition for an Extraordinary Writ with the Hawaii Supreme Court, which was summarily denied. On March 14, 1988, fourteen days before the state court trial date, Dombroski filed a Third Party Complaint in the state court against several United States Government parties, and filed a second Petition for Removal with the federal district court.

On April 22, 1988, Peabody filed his second Motion to Remand, together with a Motion for Sanctions. The district judge heard oral argument on the motions, and on May 9, 1988, entered his Order Granting Motions to Strike Third Party Complaint, to Remand Case to State Court and to Impose Sanctions ("Order Granting Remand"). The court imposed the sanctions requested by Peabody, ordering Dombroski to pay to Peabody the fees incurred as a result of the improper removal, and

suspending him from the practice of law for a period of not more than six months, pending the report of an ad hoc Committee on Discipline. The monetary sanctions were imposed against Dombroski alone, and the court specified that the Trust was not to pay any portion of them.

The underlying case is currently pending in Hawaii state court. Dombroski appeals the sanctions against him. We have jurisdiction under 28 U.S.C. §1291 (1982) to review the imposition of sanctions because the order appealed from is a final order and the appeal was timely. Any review of the underlying remand order, however, is barred. 28 U.S.C. §1447(d) (1982).

II. *DISCUSSION*

Dombroski's central argument is that sanctions against him were not warranted because his Petition for Removal was properly supported by law. If we were assiduously to address his argument, we would be required impermissibly to review an order remanding a case to state court. 28 U.S.C. §1447(d); *Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723 (1977). However, where, as here, a motion is sanctioned for being frivolous, effective review of the sanctions requires examination of the moving party's "good faith belief in the merit of a legal argument." *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830-31 (9th Cir. 1986).

Peabody's position—that we simply cannot examine the legal basis of the removal petition because that would constitute reviewing a remand order—would effectively block any appellate review of sanction awards related to removal petitions. In *Lemos v. Fencl*, 828 F.2d 616 (9th Cir. 1987), we considered two arguments challenging a sanction award for a frivolous removal. The

first was that the petition for removal was valid as a matter of law. This question, we said, could not be decided because a district court remand of a case to state court is not reviewable by the court of appeals. 828 F.2d at 617. The second argument was that the petition did not violate Rule 11 because it was not frivolous. In evaluating this argument, we did examine the legal argument on which the appellee had based his Petition for Removal. *See id.* at 618-19. We did not pass on whether the appellee's position in his Petition was correct—which would have amounted to a review of the district court's remand order—but our examination allowed us to conclude that the argument was neither "frivolous . . . [nor] legally unreasonable." *Id.* at 619.

This fine line is not one we need walk in the context of this case because we find the arguments Dombroski made in the Trust's Petition for Removal had been rejected previously by the district court. A second presentation of the same, previously rejected, theory to the same court fairly defines "frivolous." Unless Dombroski can show some relevant change subsequent to the first remand, the sanctions award was proper.

Dombroski alleges that such a change occurred. He claims that Peabody's Motion for Partial Summary Judgment made clear that Peabody was relying on a federal claim rather than a state claim, and therefore the circumstances had changed sufficiently to allow the Trust a second bite at the federal-forum apple. Peabody counters with two points: (1) the Petition for Removal was frivolous because Peabody's Motion for Partial Summary Judgment represented no change in his pleading, and (2) even if it did, the Petition was untimely. Although Peabody's second point is unavailing, his first is dispositive.

A. Timeliness of the Petition for Removal

A petition for removal must be brought within 30 days after the receipt by the defendant of a copy of "an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. §1446(b) (1982). Dombroski claims his March 14, 1988, Petition for Removal was timely because it was filed within 30 days of Peabody's Motion for Partial Summary Judgment as to Count I in the Hawaii court, which is the paper he claims provides the substantive basis of his Petition. However, Peabody had filed a practically identical motion on June 10, 1987, in federal court. Even if it were true that the later, state court Motion for Partial Summary Judgment constituted a paper that indicated the case was removable, Peabody argues, then the earlier, federal court Motion must have given the same indication, and a timely Petition for Removal would have had to have been filed within 30 days of the earlier Motion.

Peabody's argument overlooks the fact that, since the earlier Motion for Partial Summary Judgment was filed *in* federal court, the Motion could not trigger a right to remove *to* federal court. The federal summary judgment papers never became part of the state court record. They were filed simultaneously with Peabody's Motion to Remand, which the district court granted apparently without ruling on the Motion for Partial Summary Judgment. "[T]he record of the state court is considered the sole source from which to ascertain whether a case originally not removable has since become removable." 1A J. Moore & B. Ringle, *Moore's Federal Practice* ¶ 0.168[3.-5-6], at 598-99 (1987).

Dombroski's Petition for Removal was not untimely.

B. Frivolousness of the Petition for Removal

1. *Peabody's Motion for Partial Summary Judgment*

Dombroski argues that Peabody's Motion for Partial Summary Judgment was based solely on a federal cause of action, which occurred with Peabody's invocation of the federal common law of navigational servitudes. Therefore, he asserts, he correctly petitioned to remove the case to federal court. Reference to the Motion indicates that Peabody may have intended to invoke federal common law.[1] The Motion was, however, part of the papers filed with the district court at the time it granted Peabody's second Motion to Remand.[2] The fact that the district court granted that Motion indicates that it did not find there to be any federal claim in the case, notwithstanding the arguments of Peabody's Motion for Partial Summary Judgment. Therefore, we may not now independently consider the Motion for Partial Summary Judgment and decide whether, contrary to his prior representations, Peabody had altered his case to rely on federal common law. Such a determination would amount to a reevaluation of the district court's Order Granting Remand. Because we may not conduct this type of review, *see Lemos*, 828 F.2d at 617, we focus instead on Dombroski's Petition for Removal to answer the question whether the Petition was frivolous.

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[1] Even if Peabody intended to invoke federal common law, the Motion for Partial Summary Judgment did not rely on federal common law as its sole basis, as Dombroski asserts. It also invokes the theory that Peabody and his co-plaintiffs were third-party beneficiaries of the dredging permit issued by the Corps.

[2] Dombroski claims that Peabody specifically disclaimed reliance on federal law to support his Motion to Remand. If this is true, it would appear to provide an estoppel argument should Peabody try to proceed on a disclaimed federal ground in state court.

2. *Dombroski's Petition for Removal*

The district court reasoned that because the grounds raised by Dombroski in the second Petition for Removal were the same as those in the first Petition for Removal—grounds the court specifically rejected in its July 10, 1987, Order Granting Remand—Dombroski's Petition was frivolous. Because Dombroski's second Petition for Removal makes no argument that can be supported by the theory he presses on appeal—to wit, that Peabody's Motion for Partial Summary Judgment proceeded on a wholly federal claim—the district court correctly imposed sanctions.

Both Petitions for Removal allege that a federal question exists by reference to (1) 33 U.S.C. §403, which is the statute that authorizes the Corps to issue permits such as the dredging permit obtained by CHD [ER 49-50 & 140]; and (2) the takings clause of the fifth amendment. [ER 52 & 144-45]. Since these two arguments had been made in the first Petition for Removal, the court's July 10, 1987, Order Granting Remand renders them unavailable as *res judicata*. *See Cannon v. Loyola Univ. of Chicago*, 784 F.2d 777 (7th Cir. 1986) (dismissal of applicant's prior suits against medical schools challenging denial of her application barred subsequent action alleging that denial was unlawful under Title IX, and attorney's costs and fees were warranted), *cert. denied*, 479 U.S. 1033 (1987). Only if a change occurred in Peabody's case that would make these arguments relevant could Dombroski in good faith petition for removal. *See Fritzlen v. Boatmen's Bank*, 212 U.S. 364, 372 (1909) (if, after remand, subsequent pleadings or conduct of parties indicate cause is removable, right of removal upon second application is not controlled by the previous remand order).

On appeal, Dombroski identifies only one changed element in the case as permitting him properly to attempt to remove: the allegedly new reliance on federal common law revealed by Peabody's Motion for Partial Summary Judgment. Certainly neither of the two grounds above—33 U.S.C. §403 or the takings clause—can be justified on that basis. Furthermore, notably absent in Dombroski's second Petition for Removal is any allegation that Peabody's alleged invocation of federal common law regarding navigational servitudes confers jurisdiction under any statute other than 33 U.S.C. §403, which had already been rejected.[3]

We conclude that the second Petition for Removal was frivolous because its basis had previously been rejected by the district court.

C. Appropriateness of Sanctions Imposed

When the district court suspended Dombroski from practice, invoking its inherent power, it took note of two other cases in which Dombroski had been sanctioned, and stated, "[I]t appears that monetary sanctions alone are not fully effective in deterring Dombroski from sanctionable conduct." [ER 258] Dombroski argues that the court's reliance on these earlier sanctions was improper. We need not determine whether these previous sanctions were properly considered, as we find sufficient support elsewhere for the court's action in suspending Dombroski.

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[3] For example, no mention is made of 28 U.S.C. §1333(1) (1982), which confers admiralty jurisdiction on the federal district courts. In fact, Dombroski's "federal common law" argument on appeal appears to be entirely new.

When imposing sanctions under its inherent power to promote the orderly and just administration of its caseload, the district court must follow its own rules, *see In re Thalheim*, 853 F.2d 383, 389 (5th Cir. 1988); make a finding of bad faith, *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766-67 (1980); and afford due process, *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 916 (9th Cir. 1987).

The District of Hawaii's Local Rule 110-6 provides in part:

> (a) For good cause shown and after an opportunity to be heard, any member of the bar of this Court may be disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the court may deem proper.

Thus, the requirements of the District of Hawaii's court rule are subsumed in the due process requirement. Judge Fong recognized the need to afford due process to Dombroski, stating that "[e]xtraordinary safeguards are obviously required here." [ER 256] He found that Dombroski had "received the extraordinary measure of protection to which he is entitled." [ER 256] In support of this finding he cited the extent of the period during which Dombroski had notice sanctions might be imposed and the length and thoroughness of both Dombroski's briefs and oral argument in opposition to the sanctions. [ER 256-57]

Judge Fong also made a separate finding of bad faith. [ER 257, 252] The judge stated, "The fact that Mr. Dombroski removed this action in the face of a number of factors indicating that removal was improper and *after attempting repeatedly and without success to delay an impending trial* on the merits, demonstrates a flagrant

misuse of the judicial process." [ER 252] (Emphasis added). His mention of Dombroski's attempts to delay the trial on the merits refers to the series of undoubtedly harassing motions brought during the two months before the trial date in state court. *See supra* page 4. [A19]

A federal court's inherent power to sanction attorneys practicing before it is in general related to management of its own docket. *Cf. Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-30 (1962) (authority of a federal trial court to dismiss a plaintiff's action for failure to prosecute necessary "in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts").[4] On the other hand, we have recognized that federal courts have a broader duty to the public, as well. *Standing Comm. on Discipline v. Ross*, 735 F.2d 1168, 1170 (9th Cir.) (citing *Ex parte Wall*, 107 U.S. 265 (1883)), *cert. denied*, 469 U.S. 1081 (1984).

Here, it appears the district court was acting to further both objectives. We find no abuse of discretion in the district court's taking judicial notice of Dombroski's behaviour, whether in state or federal court, during the course of the case before it.

The judgment of the district court is AFFIRMED.

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[4] Similarly, Rule 11 sanctions can be imposed only for actions taken in federal court. *Hurd v. Ralphs Grocery Co.*, 824 F.2d 806, 808 (9th Cir. 1987).

APPENDIX C

Order of the District Court Granting Motions to Strike Third-Party Complaint, to Remand Case to State Court and to Impose Sanctions

(Filed May 9, 1988)

CIVIL NO. 88-0170 HMF

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GEORGE PEABODY, CITIZENS RIGHT OF WAY DEDICATION AT PUKOO COMMITTEE,
Plaintiffs,
vs.
MAUD VAN CORTLAND HILL SCHROLL TRUST, STATE OF HAWAII, AUGUST K. DEVAUCHELLE, SOPHIE M. DEVAUCHELLE,
Defendants.

MAUD VAN CORTLAND HILL SCHROLL TRUST,
Third-Party Plaintiff,
vs.
UNITED STATES OF AMERICA, DEPARTMENT OF THE ARMY, and ALFRED J. THIEDE, COLONEL, U.S. ARMY CORPS OF ENGINEERS, DISTRICT OF HONOLULU,
Third-Party Defendants.

ORDER GRANTING MOTIONS TO STRIKE THIRD-PARTY COMPLAINT, TO REMAND CASE TO STATE COURT AND TO IMPOSE SANCTIONS

Defendant Maud Van Cortland Hill Schroll Trust (Schroll Trust) filed motions for certification and to strike. The court granted plaintiffs' motion to shorten time to hear their motions to remand, to forfeit bond, and to impose sanctions and all motions came on for hearing on May 3, 1988. Boyce R. Brown, Jr. appeared on behalf of plaintiffs. James M. Dombroski and Steven B. Songstad appeared on behalf of defendant Schroll Trust. Derwin Hayashi appeared on behalf of the State of Hawaii. Theodore G. Meeker appeared on behalf of the United States of America, Department of the Army and Alfred J. Thiede, Colonel, U.S. Army Corps of Engineers, District of Honolulu (federal defendants). The court has carefully considered the submissions of the parties, together with the issues and arguments raised at oral argument, and being fully apprised of the premises therein now rules as follows:

BACKGROUND

Plaintiffs originally filed this action on September 21, 1983 in state court. Their complaint asserts three claims for relief.

Count I of the complaint alleges that Schroll Trust, in violation of an Army Corps of Engineers dredging permit, excludes the public from the navigable waters within the Pukoo Lagoon at Pukoo, Molokai. Count I seeks an injunction directing Schroll Trust to cease and desist its denial of full and free public use of the lagoon.

Count II seeks a mandatory injunction directing Schroll Trust to provide two public rights of way to the beach as required by conditions attached to the

Conservation District Use Permit issued by the State of Hawaii and the conditions attached by the Molokai Advisory Committee and the Maui Planning Commission in approving zoning changes for the property.

Count III seeks to quiet title to a roadway or, in the alternative, to establish a public easement. The roadway in question is the old Pukoo Pier road and it allegedly runs across land owned by Schroll Trust, the State of Hawaii, and August and Sophie Duvauchelle.

In December 1983 Schroll Trust removed the case to federal court pursuant to 28 U.S.C. §1446. On July 31, 1985, while this case was being litigated in federal court, State Judge Boyd P. Mossman signed an order dismissing the case for lack of prosecution. This order could only have been the result of a clerical error since the law is clear that the state court had no jurisdiction to enter such an order. 28 U.S.C. §1446(e); *In re Adams*, 809 F.2d 1187, 1189 (5th Cir. 1987) (state court without jurisdiction to enter order of voluntary nonsuit after removal to federal court).

On July 10, 1987 this court found each of plaintiffs' three causes of action to be based upon state law. It therefore ruled that Schroll Trust had improperly removed the case and that the court was without subject matter jurisdiction. The court remanded the case to state court. *See Peabody v. Schroll Trust*, Civ. No. 83-1363 (D. Haw. July 10, 1987) (order granting motion to remand case). In state court, plaintiffs obtained leave to file an amended complaint. On January 11, 1988 the amended complaint was filed and served upon counsel for Schroll Trust. A comparison of the original and amended complaints shows that the amended complaint alleges no new cause of action and adds no new parties. The amendments are minor and are not the sort that could

create federal jurisdiction where none previously existed. *See* Schroll Trust's memorandum in opposition to motion for remand at 45-48 (listing changes in amended complaint).

The case was set for trial on March 28, 1988. Counsel for Schroll Trust then began a series of actions that indicates an attempt to avoid the March 28, 1988 trial date. On January 20, 1988 Schroll Trust filed a motion for dismissal. Judge Richard R. Komo, the state court judge assigned to handle this case, denied this motion on March 9, 1988. On January 28, 1988 Schroll Trust filed a motion to vacate the trial date upon the ground that "this action was dismissed by the order of the Honorable Boyd P. Mossman on July 31, 1985." Judge Komo denied this motion by written order filed February 23, 1988.

Also on February 23, 1988 Schroll Trust filed an ex parte motion for continuance of trial date "based upon consent of the parties and previous court ruling." The motion was denied.

Three days later, on February 26, 1988, Schroll Trust filed motions to strike, for a more definite statement, and to dismiss. The motion for a more definite statement was denied on March 9, 1988. The other two motions were scheduled to be heard on March 18, 1988 together with plaintiffs' motion for summary judgment.

Also on February 26, 1988 Schroll Trust filed a "Petition for an Extraordinary Writ" with the Hawaii Supreme Court. The Petition for Extraordinary Writ is *identical* to Schroll Trust's present motion for certification. The petition advanced the same argument Judge Komo had previously denied: that the order of dismissal mistakenly entered while the case was removed

to federal court is dispositive of the issues in this case. On March 2, 1988 the Hawaii Supreme Court dismissed the petition in a one-paragraph order.

On February 29, 1988, Schroll Trust filed cross-claims against the other defendants in this case.

On March 2, 1988 Schroll Trust filed a second motion for continuance "based upon consent of parties and previous court ruling." The hearing on this motion was also scheduled for March 18, 1988.

At this point, Schroll Trust had obtained a ruling on its motion testing the validity of Judge Mossman's July 31, 1985 order. The Hawaii Supreme Court had refused to disturb that ruling. Schroll Trust's response should have been to argue the motions set for March 18, 1988 and, if these were denied, to proceed to trial. If necessary, defendant could seek further review on appeal.

On March 14, 1988, however, Schroll Trust filed a third-party complaint against the federal defendants. Schroll Trust then removed this case from state court for a second time. Counsel for Schroll Trust asserts a number of grounds for removal, each of which the court will consider presently. It is worth noting, however, that plaintiffs assert the same claims against the same parties that they did last July, when this court found Schroll Trust's first removal to be improper. It is also worth noting that Schroll Trust was able, through the latest removal procedure, to postpone the March 28, 1988 trial date, which it was otherwise unable to accomplish directly by motions.

MOTION TO REMAND

A. *Introduction*

The court must first consider plaintiffs' motion to remand this case to the state court since a challenge to defendant's right to remove is a question of federal subject matter jurisdiction. *Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368, 1371 (9th Cir. 1987). If the court finds that it is without jurisdiction over this case, then it has no power to adjudicate defendant's motions for certification and to strike. It does, however, possess jurisdiction to consider the issue of sanctions. *Lemos v. Fencl*, 828 F.2d 616, 618 (9th Cir. 1987).

Removal from state to federal court is statutory in nature and the statute is strictly construed against removal and in favor of remand. *Sullivan*, 813 F.2d at 1371; *Gould v. Mutual Life Insurance Co. of New York*, 790 F.2d 769, 773 (9th Cir. 1986). Strict construction minimizes the delay and waste of resources involved in starting a case over in federal court once substantial proceedings have occurred in state court. *Johnson v. Trans World Airlines, Inc.*, 660 F.Supp. 914, 916 (C.D. Cal. 1987). On a motion to remand, the party invoking the removal statute has the burden of establishing jurisdiction. *Sullivan*, 813 F.2d at 1371. A civil action in state court is removable only if the action could have been brought in federal court originally. *Bale v. General Telephone Co. of California*, 795 F.2d 775, 778 (9th Cir. 1986).

On March 14, 1988 Schroll Trust filed a verified petition for removal alleging various grounds for federal jurisdiction. On April 6, 1988 Schroll Trust filed an amended petition for removal. The court will eventually consider whether either petition complied with the thirty-day removal period of 28 U.S.C. §1446.

Removal is accomplished merely by filing a verified petition in compliance with the requirements of 28 U.S.C. §1446. No court order is required. *Okot v. Callahan*, 788 F.2d 631 (9th Cir. 1986). Hence, the power to remove a case is susceptible to abuse, such as when a defendant effects removal merely to delay trial or to harass an opposing party. *See, e.g., Hewitt v. City of Stanton*, 798 F.2d 1230, 1232 (9th Cir. 1986) (affirming imposition of sanctions for frivolous removal).

Section 1441 of Title 28, United States Code describes actions that are removable to federal court. Subsections (a) and (b) authorize removal of any action "of which the district courts of the United States would have original jurisdiction". Removal under these subsections is proper where a federal question exists or where the court could exercise diversity jurisdiction. Subsection (c) allows removal of an entire action if it includes as one of its claims a "separate and independent claim or cause of action, which would be removable if sued upon alone".

Section 1446 of Title 28 provides the procedure that a defendant must follow in order to remove a case to federal court. There is a mandatory requirement that the action be removed, if at all, within thirty days of its first becoming removable, 28 U.S.C. §1446(b). All defendants must join in a removal petition with the exception of nominal parties. *Hewitt*, 798 F.2d at 1232; 28 U.S.C. §1446(b). Petitions for removal must be accompanied by a bond from which defendants will pay costs resulting from improper removal. 28 U.S.C. §1446(d). Notice of removal must be promptly given to adverse parties and to state court, 28 U.S.C. §1446(e). Such notice divests the state court of jurisdiction to proceed any further in the case. *Id.*; *In re Adams*, 809 F.2d at 1189.

If the federal court finds that removal was improper and that it does not possess jurisdiction, it must remand the action to state court. Such a remand is not reviewable on appeal or otherwise. *Lemos v. Fencl*, 828 F.2d 616, 617 (9th Cir. 1987); 28 U.S.C. §1447(d). Any substantive adjudication, however, is separately reviewable, *Scott v. Machinists Automotive Trades District Lodge 190*, 815 F.2d 1281, 1284 (9th Cir. 1987).

Plaintiffs argue that Schroll Trust's second petition for removal was frivolous and improper because (1) the court has already remanded this case once, (2) there is no separate and independent cause of action, (3) there is no federal question, (4) removal was not timely, (5) all defendants did not join in the petition for removal, and (6) diversity jurisdiction does not exist.

Schroll Trust responds that (1) plaintiffs' factual allegations are not supported by affidavits or declarations, (2) a number of significant changes have occurred since the court remanded this case last year, (3) separate and independent causes of action exist, (4) questions of federal statutory and constitutional law are present, (5) removal was timely, (6) all defendants did not need to join in the petition for removal, and (7) diversity jurisdiction exists as to particular counts and because all other defendants are merely nominal.

B. *Supporting Documentation*

The court turns first to Schroll Trust's suggestion that it should disregard plaintiffs' factual allegations because they are not supported by affidavits or declarations. Schroll Trust argues that Local Rule 220-7 requires such supporting documentation. The court declines to adopt this suggestion. For one thing, the state court record supports plaintiffs' statement of facts.

Furthermore, plaintiffs' counsel have signed each submission and are therefore bound by the requirements of Fed. R. Civ. P. 11. Rule 11 provides that an attorney's signature on a memorandum constitutes a certification that "to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact . . . ." Plaintiffs' counsels' signatures therefore constitute declarations that the facts alleged in his memorandum are true to the best of counsels' knowledge and information.

C. *Federal Question Jurisdiction*

Schroll Trust alleges, apparently in the alternative, that (1) federal question jurisdiction exists over plaintiffs' entire claim and removal is proper pursuant to §1441(a) and (b) or that (2) a portion of plaintiffs' claim constitutes a separate and independent cause of action and that the entire claim is removable under §1441(c).

The court finds that plaintiffs' complaint alleges a "wrongful invasion of a single primary right," the right of access to Pukoo Lagoon. *See American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 14, 71 S.Ct. 534, 540 (1951). Therefore, there is no separate and independent cause of action in this case. *See Finn*, 341 U.S. at 14, 71 S.Ct. at 540 (no separate and independent cause of action exists where there is a "single wrong to plaintiff . . . arising from an interlocked series of transactions"); *Contemporary Services v. Universal City Studios*, 655 F.Supp. 885, 888 (C.D. Cal. 1987); *Bailey v. Scholler*, 630 F.Supp. 337, 338-39 (D. Mont. 1986). The court will therefore examine the allegations in Schroll Trust's petition to see whether a federal question exists making removal appropriate under §1441(a) and (b).

Schroll Trust argues that Count I of plaintiffs' lawsuit seeks to establish a public easement by way of a navigational servitude based upon an interest claimed by the United States and that federal jurisdiction exists over this claim pursuant to 28 U.S.C. §1346(f). This argument is frivolous. The only federal "interest" in this case stems from that fact that seventeen years ago the Army Corps of Engineers issued a dredging permit to Schroll Trust's predecessor in interest. A condition of that permit required public access to navigable water adjacent to or resulting from the dredging. The plaintiffs merely seek to force Schroll Trust to comply with the terms of that permit. The United States claims no interest whatsoever.

Schroll Trust also argues that Count II is an attempt to quiet title to an interest in property in which the United States claims an interest, and that jurisdiction exists pursuant to 28 U.S.C. §2409. Count II, however, merely seeks to enforce conditions attached to a state use permit and a county zoning change. Section 2409 provides no federal jurisdiction here, where the United States neither holds nor claims any interest in the land affected by these conditions. Therefore, Schroll Trust's lengthy citations to *Key v. Wise*, 629 F.2d 1049, 1060 (5th Cir. 1980), are inappropriate since in that case the United States had acquired perpetual easements from the Wises for the purpose of constructing a levee.

Schroll Trust next alleges that the court possesses federal question jurisdiction over this action because plaintiffs' right to relief in Count I depends upon the dredging permit mentioned above. Schroll Trust argues that the validity of the permit is an element of plaintiffs' proof and that this creates a federal question under 33 U.S.C. §403, which forbids the dredging or filling of

navigable waters without such a permit. Schroll Trust therefore claims that the court has jurisdiction under 28 U.S.C. §§1331, 1337(a) and 1346(f).

Regardless of whether the dredging permit forms the basis of plaintiffs' claim, this argument does not demonstrate a federal question justifying removal. Such a federal question must be apparent on the face of plaintiffs' "well-pleaded complaint."[1] *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10, 103 S.Ct, 2841, 2846 (1983); *Sullivan*, 813 F.2d at 1371. However, defendant may *not* obtain federal jurisdiction merely by asserting a *defense* based upon federal law. *Franchise Tax Board*, 463 U.S. at 10, 103 S.Ct. at 2846; *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 43 (1908); *Sullivan*, 813 F.2d at 1371.

Plaintiffs' complaint alleges that Schroll Trust has denied public access to navigable waters in violation of a condition of the dredging permit. Plaintiffs seek to confirm the alleged right of access, arguing that they are third-party beneficiaries to Schroll Trust's contractual obligation to provide such access. This claim does not "arise under" 33 U.S.C. §403, which merely forbids dredging without a permit. Plaintiffs' complaint does not challenge the constitutionality of §403 or the validity of the dredging permit. Therefore, no federal question exists on the face of plaintiffs' amended complaint.

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[1] A complaint is not "well-pleaded" if plaintiff omits a question of federal law essential to his claim merely to escape federal jurisdiction. *Harper v. San Diego Transit Corp.*, 764 F.2d 663, 666 (9th Cir. 1985). Under such a situation, defendant may remove under the "artful pleading" doctrine. This is a narrow exception to the general rule that the plaintiff is the master of his complaint. It does not apply here, where there is no question of federal law essential to plaintiffs' claim. *Franchise Tax Board*, 463 U.S. at 9, 22, 103 S.Ct. at 2846, 2853.

Schroll Trust responds that plaintiffs' interpretation of the permit renders it invalid either as a matter of statutory construction or as an unconstitutional taking of property without due process of law. The validity of the Corps of Engineers' dredging permit is a defense to plaintiffs' claim; it does not constitute any part of plaintiffs' well-pleaded complaint. A presumption of regularity attaches to such permits and it is defendant's burden to show it is in some way invalid. The fact that Schroll Trust has raised questions of federal law in its defense does not confer federal question jurisdiction on this court. *Franchise Tax Board*, 463 U.S. at 10, 103 S.Ct. at 2846.

More important than this, however, is the fact that the court adjudicated this issue in its July 10, 1987 order. The court in that order reviewed the complaint and found that it did not challenge the validity of either the permit or §403. The Court thus concluded that "the incidental relationship of §403 to this action is not sufficient to create a federal question." July 10, 1987 order at p.7. Schroll Trust filed a motion for reconsideration of this decision, which the court denied on August 14, 1987.

In advancing this same argument to justify its second removal from state court. Schroll Trust has quite blatantly disregarded the court's July 10, 1987 order. Although Schroll Trust advances several arguments in support of a second right of removal (*see* memorandum in opposition at 3-4), plaintiffs' amended complaint plainly does not create such a right, since it alleges claims that are identical to those of the original complaint. In order for an amended complaint to "revive" defendant's right to remove, the new complaint must so change the nature of the action as to constitute

"substantially a new suit begun that day." *Douglass v. Weyerhaeuser Co.*, 662 F.Supp. 147, 149 (C.D. Cal. 1987) (quoting *Fletcher v. Hamlet*, 116 U.S. 408, 410, 6 S.Ct. 426 (1886)); *Johnson*, 660 F.Supp. at 916. that is certainly not the case here and counsel for Schroll Trust is, or should be, aware of this fact.

D. *Timeliness*

Because the amended complaint did not constitute "substantially a new suit" when it was filed and served on January 11, 1988, Schroll Trust did not obtain a new opportunity to remove. Therefore, its second petition of removal was untimely.

Even if the amended complaint *did* create a second right of removal, Schroll Trust waited until March 14, 1988 to file its petition. The removal statute, 28 U.S.C. §1446(b), specifies in part as follows:

> The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . . .

The time limitations of 1446(b) are mandatory and the defendant must strictly comply with them. *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980); *Douglass*, 662 F.Supp. at 149. Schroll Trust admits that it did not remove this case within thirty days of January 11, 1988 but argues (1) that plaintiffs' failure to attach exhibits to the amended complaint means that the *effective* filing date was March 9, 1988, the date plaintiffs corrected this failure and (2) that the case only recently became removable.

In support of its first contention, Schroll Trust argues that plaintiffs neglected to attach exhibits one through twelve to their amended complaint and that, although it was served with the amended complaint on January 11, 1988, the thirty-day removal period did not commence until the exhibits were served on March 9, 1988. Schroll Trust does not explain how the absence of the exhibits kept it from removing after January 11, 1988. It has therefore failed to carry its burden of demonstrating a right to remove. *See Sullivan*, 813 F.2d at 1371. *See also United States v. Vernon*, 108 F.R.D. 741, 742 (S.D. Fla. 1986) (plaintiff's failure to attach exhibits to the complaint is not necessarily fatal to complaint's effectiveness).

In support of its argument that this case only recently became removable, Schroll Trust points to the second paragraph of §1446(b), which provides in part as follows:

> If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

Schroll Trust argues that the verified petition was filed within thirty days after service of (1) plaintiffs' motion for partial summary judgment as to Count I; (2) an order granting Schroll Trust's motion to set aside entry of default against it, filed February 23, 1988; (3) a stipulation between defendant State of Hawaii and plaintiffs, and (4) the filing of Schroll Trust's Third Party Complaint against the United States, Department of the Army and the Army Corps of Engineers on March 14, 1988. None of these events creates even a remote right to remove this action from state court.

First, Schroll Trust argues that plaintiffs' motion for partial summary judgment relies upon the Supreme Court's decision in *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383 (1979), and that such reliance creates a right to remove. This is a frivolous argument. Although a summary judgment motion may under certain circumstances establish a right to remove, that certainly did not happen here. Schroll Trust raised a federal defense to Count I of the amended complaint when it asserted that the public access condition in the dredging permit amounts to an unconstitutional taking. Plaintiffs' motion for summary judgment cited *Kaiser Aetna* in response to this defense. In a motion for summary judgment, a plaintiff does not create a federal question by citing federal law to rebut a previously raised federal defense.

Schroll Trust's second argument is equally frivolous. Default was initially entered against Schroll Trust for its failure to file a timely answer to the amended complaint. The fact that the state court later set aside that default does not create a right of removal where Schroll Trust had been served and where no right to remove existed in the amended complaint.

Schroll Trust's third argument, that a stipulation between plaintiffs and defendant State of Hawaii created a right of removal is also meritless. Schroll Trust argues that this stipulation effectively removed the State of Hawaii as a defendant. It argues that as a result of the stipulation the Pukoo Pier road must be a county road, not a state road, and that the State of Hawaii is therefore a nominal defendant. This argument misstates plaintiffs' claim against the State of Hawaii. That claim

is one of adverse possession against the State as the present owner of *land* over which the road once passed, *not* against the State as the owner of the road itself.[2]

Thus, although the stipulation resolves certain aspects of plaintiffs' claim against the State, it does not resolve the main issue, which concerns the nature of the public's rights, if any, in the land once used as the Pukoo Pier road. The stipulation neither alters the allegations in the complaint nor does it dismiss the State from the action. *See Strasser v. KLM Royal Dutch Airlines*, 631 F.Supp. 1254, 1256 (C.D. Cal. 1986) (plaintiff must dismiss all non-diverse defendants before action becomes removable).

The fourth argument is perhaps the most frivolous of all. Schroll Trust asserts that the court should find removal proper because it filed a third-party complaint against the federal defendants. Schroll Trust's third-party complaint alleges that the public access condition in the dredging permit either does not apply to Pukoo Lagoon or else that it is unconstitutional. The third-party complaint seeks relief in the form of a declaration to that effect.

Schroll Trust's third-party complaint constitutes an attempt to convert its defense concerning the validity of the dredging permit into an affirmative cause of action against the government. This is not a proper third-party complaint under Haw. R. Civ. P. 14. Rule 14 permits third-party complaints only against one who is or may be liable to

[2] This misstatement can hardly constitute an innocent error on the part of Schroll Trust's counsel since he demonstrates an intimate understanding of this particular claim in other portions of his argument. For example, he states that plaintiffs "cannot expect to prove an adverse possession claim, such as a prescriptive easement, against the State." Memorandum in opposition at 12. Although this comment on the merits of plaintiffs' claim indicates that the earlier misstatement may have been intentional, it is of course irrelevant to the issue of whether removal was proper.

the plaintiffs or to the third-party plaintiff for all or part of plaintiffs' claim. That is not the case here. For one thing, Schroll Trust does not allege that the federal defendants are liable to it for any part of plaintiffs' claim. Furthermore, a court of competent jurisdiction can adjudicate this issue without the presence of the third-party defendants.

Even if the third-party complaint were not frivolous, a third-party *plaintiff* has no right to remove the action. Such a right, if it exists at all, belongs to the third-party defendant only. 28 U.S.C. §1441(a). *See Takeda v. Northwestern National Life Insurance Co.*, 765 F.2d 815, 822 (9th Cir. 1985).

Because the court has found each of the events allegedly creating a right to remove to be frivolous, it concludes that the verified petition of removal was untimely.

E. *The Third-Party Complaint*

The court possesses jurisdiction to strike Schroll Trust's third-party complaint, pursuant to Fed. R. Civ. P. 12(f), should such action be appropriate. This is because the court has an independent basis of jurisdiction over the third-party complaint. 28 U.S.C. §1346(a)(2). *See Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1315 (9th Cir. 1986) (jurisdiction exists to consider defendant's counterclaim where independent basis of federal jurisdiction exists); *Gould v. Mutual Insurance Co. of New York*, 790 F.2d 769, 773 (9th Cir. 1986). *See also Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 703, 92 S.Ct. 1344, 1348 (1972) (quoting *Mackay v. Uinta Development Co.*, 229 U.S. 173, 176, 33 S.Ct. 638, 639 (1913) that " 'regardless of the manner in which the case was

brought or how the attendance of the parties in the United States court was secured' " court could adjudicate a claim over which it possessed original jurisdiction).

Rule 12(f) of the Federal Rules of Civil Procedure provides in part as follows:

> Upon motion made by a party . . . the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

See Supermarket of Homes v. San Fernando Valley Bd., 786 F.2d 1400, 1409 (9th Cir. 1986). "The court has discretion to strike the third-party claim if it is obviously unmeritorious and can only delay or prejudice the disposition of the plaintiff's claim . . . ." Fed. R. Civ. P. 14 advisory committee's note.

The court will exercise its discretion. Schroll Trust's third-party complaint is hereby stricken because it does not comply with Rule 14 of either the Hawaii or federal rules of procedure and because it appears to have no function other than as a futile attempt to create federal jurisdiction where none previously existed.

F. *All Defendants Must Join Petition*

All defendants must join in a removal petition with the exception of nominal parties. *Hewitt*, 798 F.2d at 1232; 28 U.S.C. §1446(b). In this case the defendants are Schroll Trust, August and Sophie Devauchelle and the State of Hawaii. Yet only Schroll Trust has signed the verified petition of removal.

A defendant is a nominal defendant where its role is limited to that of stakeholder or depository. *Hewitt*, 798 F.2d at 1233. The other defendants are adjoining landowners named in Count III of the amended complaint, which alleges that the Pukoo Pier road ran across their property. August and Sophie Devauchelle have denied this allegation. The State of Hawaii is negotiating with plaintiffs to resolve this issue.

Because each defendant is subject to liability on Count III and because Schroll Trust has offered no evidence that they are merely stakeholders or depositories, the court finds that the Devauchelles and the State of Hawaii clearly are not nominal defendants. Schroll Trust therefore was required to obtain their consent to removal.

G. *Diversity Jurisdiction*

Schroll Trust further argues that removal is appropriate because the court possesses diversity jurisdiction under 28 U.S.C. §1332. When an action is removed based upon diversity, complete diversity must exist at the time of removal. *Gould*, 790 F.2d at 773. The court generally looks to plaintiffs' complaint to determine whether complete diversity exists. *Id.*

Plaintiffs are citizens of Hawaii. Their amended complaint names four defendants. Defendant Schroll Trust is a trust organized under the laws of Minnesota. Defendants August and Sophie Devauchelle are citizens of Hawaii. The State of Hawaii is the other defendant. Therefore, complete diversity does not exist on the face of plaintiffs' amended complaint.

Complete diversity may also exist if plaintiffs, by some voluntary act, create complete diversity where none existed before. *Id.; Self v. General Motors Corp.*, 588 F.2d 655, 657-58 (9th Cir. 1978). An involuntary act, such as the granting of summary judgment to non-diverse parties, does not create a right to remove. *Id.*

Schroll Trust offers three reasons why it believes diversity jurisdiction exists. First, it alleges that the issues in Count III have been resolved as a result of the above-mentioned stipulation between plaintiffs and the State of Hawaii and as a result of a Maui County permit that defines a public right of way from Kamehameha Highway to the sea. Because Count III is the only count alleging a cause of action against the non-diverse defendants, Schroll Trust argues that the case has now become removable through plaintiffs' voluntary action.

This argument is meritless. The stipulation and the permit do not resolve the issues in Count III. Plaintiffs' claim concerns the public's interest, if any, in land that was once used as the Pukoo Pier road. Any permit issued by Maui County cannot affect that property interest, which plaintiffs allege arose by prescription. Each defendant is the present owner of a portion of the land in question. Plaintiffs have not voluntarily dismissed any of these defendants. Nor have they settled with or otherwise dismissed any defendant. *See Lemos v. Fencl*, 828 F.2d 616, 619 (9th Cir. 1987) (quoting *American Car and Foundry Co. v. Kettelhake*, 234 U.S. 311, 316, 35 S.Ct. 355, 356 (1915) which held removal improper unless

resident defendants had "so completely disappeared from the case as to leave the controversy one entirely between the plaintiff and a non-resident defendant").

Second, Schroll Trust argues that, since it is the only defendant named in Counts I and II, the court possesses diversity jurisdiction over those two counts. Schroll Trust argues that Counts I and II constitute separate and independent causes of action and that the entire action is therefore removable under 28 U.S.C. §1441(c). In the alternative, Schroll Trust argues that plaintiffs' claim in Count III is asserted against the owners of separate parcels of property and that quiet title actions against separate parcels are "severable," hence separate and independent.

Neither argument has merit. The court has already held that there are no separate and independent causes of action in this case. Therefore, the fact that diversity exists as to individual counts of the amended complaint cannot provide a basis for removal under §1441(c). In addition, plaintiffs' quiet title action in Count III cannot constitute separate and independent causes of action against each defendant since plaintiffs assert against each the same right—an easement, deriving from the same source—the old Pukoo Pier road. *See Finn*, 341 U.S. at 14, 71 S.Ct. at 540.

Finally, Schroll Trust argues that diversity jurisdiction exists because the other defendants have "essentially conceded the merits of Count III." Therefore, these defendants should be realigned as party plaintiffs for the purposes of removal. This argument is without merit. If a case is not removable on the face of

plaintiffs' complaint, "it cannot be made removable by any statement in the petition for removal or in subsequent pleadings by the defendant." *Self*, 588 F.2d at 659 (quoting *Great Northern Ry. v. Alexander*, 246 U.S. 276, 281, 38 S.Ct. 237, 239 (1918)). Furthermore, a review of August and Sophie Devauchelle's answer to the amended complaint shows that they have *not* conceded all or any portion of Count III.

Schroll Trust has failed to demonstrate that complete diversity exists. Therefore, removal on this ground was improper.

H. *Conclusion*

None of the reasons Schroll Trust advances to support its second petition for removal is even remotely persuasive. The court has already remanded this case once, in an order Schroll Trust has chosen to ignore. The court has, however, considered the arguments advanced in Schroll Trust's second petition. It has found many, if not most of them to be frivolous. There is no separate and independent cause of action in this case. There is no federal question. Removal was not timely. All defendants did not join in the petition for removal. Diversity jurisdiction does not exist.

Plaintiffs' motion to remand this case to state court is GRANTED. Plaintiffs counsel have submitted an affidavit demonstrating that they have incurred $486.88 in costs resulting from Schroll Trust's improper removal. They are entitled to have Schroll Trust reimburse them for these costs. *Tralmer v. Galaxy Airlines, Inc.*, 611 F.Supp. 633, 635 (D. Nev. 1985). Therefore, Schroll Trust's $250 bond, posted pursuant to 28 U.S.C. §1446(d), is forfeited to plaintiffs and Schroll Trust is ordered to pay plaintiffs an additional $236.88 to fully

reimburse plaintiffs' counsel. *See id.; Utah v. Livsey*, 312 F.Supp. 1397, 1399 (D. Utah 1970) (removal bond is exacted to protect plaintiff against improper removal); 28 U.S.C. §1447(c).

The court is without jurisdiction to consider the merits of Schroll Trust's motions for certification and to strike.

MOTION FOR SANCTIONS

A. *Monetary Sanctions*

On April 22, 1986 plaintiffs moved for sanctions under Fed. R. Civ. P. 11, alleging that Schroll Trust's second removal was frivolous and that its counsel, James M. Dombroski, filed the removal petition and the motions for certification and to strike for the improper purposes of delaying trial, needlessly increasing the cost of litigation, and harassing opposing counsel. Because the court has not adjudicated the motions for certification and to strike, it will not consider whether or not these motions are sanctionable. Such consideration is appropriate, however, for Schroll Trust's improper removal from state court.

Fed. R. Civ. P. 11 provides in part that:

> The signature of an attorney or party constitutes a certificate that the signer has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion or other paper is

> signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . .

Rule 11 addresses two separate problems: "first, the problem of frivolous filings; and second, the problem of misusing judicial procedures as a weapon for personal or economic harassment." *Lemos*, 828 F.2d at 618; *Zalvidar v. City of Los Angeles*, 780 F.2d 823, 830 (9th Cir. 1986). Plaintiffs allege that Mr. Dombroski's removal of this case for a second time was frivolous and constituted a misuse of judicial procedures.

A filing is frivolous under Rule 11 if it is unreasonable when viewed from the perspective of "a competent attorney admitted to practice before the district court." *Id.* In *Zalvidar*, the court of appeals held that "Rule 11 sanctions shall be assessed if the paper filed in district court and signed by an attorney or an unrepresented party is frivolous, legally unreasonable, or without factual foundation, even though the paper was not filed in subjective bad faith." *Id.* at 831.

Rule 11 sanctions are also appropriate when a filing is a misuse of judicial procedures. The standard under this "improper purpose" clause is also one of reasonableness. Objectively viewed, the filing must not be filed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. *Id.*

"Sanctions are mandatory if the court concludes that Rule 11 has been violated." *Hudson v. Moore Business Forms, Inc.*, 827 F.2d 450, 453 (9th Cir. 1987); *Unioil, Inc., et al. v. E.F. Hutton, et al.*, 809 F.2d 548, 559 (9th Cir. 1986). Sanctions must, however, be "appropriate." An appropriate sanction is one that is reasonable in

scope and in amount, one that will deter future sanctionable conduct but will not act to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. *Hurd v. Ralph's Grocery Co.*, 824 F.2d 806, 810-11 (9th Cir. 1987); *Matter of Yagman*, 796 F.2d 1165, 1182-1184 (9th Cir. 1986).

In view of the court's disposition of plaintiffs' motion to remand, counsel for Schroll Trust could not reasonably have formed a good faith belief that removal was proper. The court has already remanded this case once, in an order Mr. Dombroski has chosen to ignore. There is no separate and independent cause of action in this case. There is no federal question. Removal was not timely. All defendants did not join in the petition for removal. Diversity jurisdiction does not exist. The fact that Mr. Dombroski removed this action in the face of a number of factors indicating that removal was improper and after attempting repeatedly and without success to delay an impending trial on the merits, demonstrates a flagrant misuse of the judicial process.

Removal effectively postponed the March 28, 1988 trial date. It added significantly to the expense of this litigation. The removal petition contains numerous frivolous arguments, demonstrating an intent to harass plaintiffs' counsel. The manner and timing of Mr. Dombroski's removal, and the removal itself, therefore constitutes sanctionable conduct under Rule 11.

Plaintiffs' counsel have submitted an itemized schedule of fees incurred as a result of Mr. Dombroski's improper removal.[3] The court finds the following fees to

[3] Plaintiffs' counsel have also included fees incurred as a result of Mr. Dombroski's motions for certification and to strike. Because the court has not ruled on these motions, it will not order him to pay these fees.

be reasonable in light of the considerations set forth in Disciplinary Rule 2-106(B), as adopted by the Court of Appeals for the Ninth Circuit and the Hawaii Supreme Court, although they are considerably less than those plaintiffs have requested. *See Miller v. Los Angeles County Board of Education*, 827 F.2d 617, 620-21 (9th Cir. 1987); *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975); *Strouss v. Simmons*, 66 Haw. 32, 51 (1982); *Sharp v. Hui Mahine, Inc.*, 49 Haw. 241, 244-45 (1966).

Boyce R. Brown Jr.	30 hours X $150/hr =	$4,500.00
Lynn Merrick	35 hours X $95/hr =	$3,325.00
Brian Jenkins	0.1 hour X $95/hr = $	9.50
Total		$7,834.50

James Dombroski is ordered to pay $7,834.50 to plaintiffs' counsel within thirty days of the filing of this order. Because Mr. Dombroski's improper and frivolous removal to federal court involved such a blatant disregard for so many legal principles and precedents of which he was or should have been aware, he is ordered to pay this sanction himself. Under no circumstances is he to charge Schroll Trust, directly or indirectly, for the results of his own misuse of the judicial process. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766, 100 S.Ct. 2455, 2464 (1980) (court's power over members of its bar at least as great as its authority over litigants); *Miranda v. Southern Pacific Transportation Co.*, 710 F.2d 516, 521 (9th Cir. 1983) (holding sanctions against attorney rather than litigant to be appropriate); Fed. R. Civ. P. 11.

B. *Disciplinary Suspension*

In addition to monetary sanctions, plaintiffs have requested that the court consider suspending Mr. Dombroski, pursuant to Local Rule 110-6, from the privilege of practicing before the federal court in this district. This is an extraordinary request and one that the court treats as an extremely serious matter.

Plaintiffs point out that the court has previously imposed monetary sanctions on Mr. Dombroski. *See Bulgo v. Munoz*, Civ. No. 85-1206 (D. Haw. August 13, 1987) (order re: motions for attorney's fees and costs) (finding that Mr. Dombroski's "claims against Munoz and L & C were so meritless as to be brought in bad faith"). In view of the fact that Mr. Dombroski has continued to misuse the judicial process, plaintiffs argue that the only way to deter future sanctionable conduct is to suspend him from practice for a period of time, in addition to assessing fees and costs against him.

Local Rule 110-6 provides in part as follows:

> For good cause shown and after an opportunity to be heard, any member of the bar of this court may be disbarred, suspended from practice for a definite period of time, reprimanded, or subjected to such other discipline as the court may deem proper.

Plaintiffs' request is directed to the court's inherent power to impose sanctions to promote the orderly and just administration of its caseload. *Roadway Express*, 447 U.S. at 766-67, 100 S.Ct. at 2464; *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 916 (9th Cir. 1987); *In re Itel Securities Litigation*, 791 F.2d 672, 676 (9th Cir. 1986).

Sanctions under the court's inherent power are only appropriate if the court finds that Mr. Dombroski removed this case in bad faith. *Roadway Express*, 447

U.S. at 767, 100 S.Ct. at 2465; *United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983). "For the purposes of imposing sanctions under the inherent power of the court, a finding of bad faith 'does not require that the legal and factual basis for the action prove totally frivolous . . . .'" Instead, sanctions are appropriate "'where a litigant is substantially motivated by vindictiveness, obduracy, or mala fides . . . .'" *In re Itel*, 791 F.2d at 675 (quoting *Lipzig v. National Student Marketing Corp.*, 663 F.2d 178, 182 (D.C. Cir. 1980)). Removal for the purposes of delay may also constitute bad faith. *See Blodgett*, 709 F.2d at 610. *See also Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1974); *Toombs v. Leone*, 777 F.2d 465, 471 (9th Cir. 1985).

Even where bad faith is shown, there are other limits on the court's power to impose sanctions. "The need for the orderly administration of justice does not permit violations of due process." *Televideo Systems*, 826 F.2d at 916. Sanctions "should not be assessed lightly or without fair notice and an opportunity for hearing on the record." *Roadway Express*, 447 U.S. at 767, 100 S.Ct. at 2464; *Miranda*, 710 F.2d at 522. Notice before the imposition of sanctions may be actual or constructive. *Federal Trade Commission v. Alaska Land Leasing, Inc.*, 799 F.2d 510, 608 (9th Cir. 1987). The party subject to sanctions must also have sufficient opportunity to demonstrate that his conduct was not undertaken recklessly or willfully. *Id.; Toombs*, 777 F.2d at 472. A sufficient opportunity is one in which there is an opportunity to prepare a defense and explain questionable conduct. *Miranda*, 710 F.2d at 522-23.

The degree of procedural protection required depends on the seriousness of the proposed disciplinary action. *See id.* Extraordinary safeguards are obviously required here, where the court has been asked to consider suspending a member of its bar from the privilege of practicing before it.

In this case, Mr. Dombroski has received the extraordinary measure of protection to which he is entitled. Shortly after Mr. Dombroski removed this case to federal court, plaintiffs' counsel informed him of his intention to seek sanctions. On April 22, 1988 the court set plaintiffs' motion for sanctions for hearing together with their motion to remand and Schroll Trust's motions for certification and to strike. On the same date, court personnel informed counsel for Schroll Trust of this fact. Mr. Dombroski therefore received notice on April 22, 1988 that, should the court find his removal to have been improper, it would consider imposing the sanctions plaintiffs had requested. Specifically, plaintiffs sought an award of attorneys' fees and a temporary suspension from practice before this court.

On April 29, 1988 Mr. Dombroski, with assistance from his recently retained co-counsel, Steven Booth Songstad, filed memoranda in opposition to the motion to remand and the motion for sanctions. These memoranda demonstrate that Mr. Dombroski had a full opportunity to prepare a written defense against plaintiffs' allegations and to explain why his second removal was proper and did not constitute sanctionable conduct. The memorandum in opposition to plaintiffs' motion to remand, for example, is seventy-eight pages long and cites fifty-three cases, eight statutes and numerous rules and secondary authorities. Twenty-six exhibits are attached to the memorandum. Mr. Dombroski's

memorandum in opposition to plaintiffs' motion for sanctions advances additional arguments and incorporates by reference his memorandum in opposition to the motion for remand.

On May 3, 1988 the court heard oral argument on the motion to remand. This hear g lasted over two and one-half hours, during which time Mr. Dombroski argued at length on the propriety of his removal. The court entertained as much allocution as Mr. Dombroski cared to offer in support of his position. At the conclusion of all argument, the court delivered its ruling.

Based upon all the evidence, the court is convinced that Mr. Dombroski removed this action from state court in bad faith for the purpose of delaying trial and harassing plaintiffs. He has forced this court, which has one of the heaviest caseloads in the nation, to relitigate issues that should be settled law and to make findings concerning the frivolous nature of his removal. His conduct constitutes an affront to the court and is deserving of severe sanctions under the court's inherent power.

This court has previously found Mr. Dombroski to have engaged in meritless and bad faith litigation. *See Bulgo v. Munoz*, Civ. No. 85-1206 (D. Haw. August 13, 1987) (order re: motions for attorney's fees and costs). The United States Magistrate has also recently imposed sanctions under Fed. R. Civ. P. 11. *Maisonville v. F2 America, Inc.*, Civ. No. 87-0521 (D. Haw. April 20, 1988) (order granting Rule 11 sanctions). In view of the fact that removal took place after the court sanctioned Mr. Dombroski in *Bulgo*, it appears that monetary sanctions alone are not fully effective in deterring Dombroski from sanctionable conduct. There seems to be little choice but to impose a harsher sanction.

Therefore, effective immediately, the court temporarily suspends Mr. James M. Dombroski from the privilege of practicing before the United States District Court for the District of Hawaii for a period of not more than six months, pending the report of an ad hoc Committee on Discipline. The court will appoint this ad hoc committee pursuant to Local Rule 110-6(b) to consider the question of whether Mr. Dombroski should be permanently disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the court may deem proper. Should the ad hoc committee conclude that there is probable cause for such disciplinary action, Mr. Dombroski shall have a full opportunity pursuant to Local Rule 110-6(c) to show cause why further disciplinary action should not be taken.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, May 6, 1988

/s/ HAROLD M. FONG
United States District Judge

APPENDIX D

Order of the District Court Denying Application for Stay

(Filed July 14, 1988)

CIVIL NO. 88-0170 HMF

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

GEORGE PEABODY, CITIZENS RIGHT OF WAY DEDICATION AT PUKOO COMMITTEE,
Plaintiffs,

vs.

MAUD VAN CORTLAND HILL SCHROLL TRUST, STATE OF HAWAII, AUGUST K. DEVAUCHELLE, SOPHIE M. DEVAUCHELLE,
Defendants.

ORDER DENYING APPLICATION FOR STAY

James M. Dombroski has applied for an order staying enforcement of that portion of the court's May 9, 1988 order that suspended his privilege of practicing law before the United States District Court for the District of Hawaii. He seeks this stay pending disposition of his appeal to the Court of Appeals for the Ninth Circuit.

The court has previously granted Dombroski's application for a stay of that portion of the court's order that imposed monetary sanctions. The court did so on condition that Dombroski give security in the form of a supersedeas bond in the amount of $8,680.63.

In seeking a stay of his suspension, Dombroski offers nothing comparable to the supersedeas bond to ensure that he does not continue the pattern of meritless and bad faith federal litigation that led the court to impose this suspension in the first place.

Because Dombroski cannot and does not offer sufficient assurance that he will exercise the privilege of practicing before this court with the minimum standard of decency and professionalism expected of all attorneys, the court declines to stay his suspension.

Dombroski's application raises an additional issue that the court should address at this time. In its May 9, 1988 Order Granting Motions to Strike Third-Party Complaint, to Remand Case to State Court and to Impose Sanctions, the court stated that it was suspending Dombroski, in part, because he previously had been sanctioned in *Bulgo v. Munoz*, Civ. No. 85-1206 (D. Hawaii Aug. 13, 1987).

Dombroski correctly points out that he was not sanctioned *personally* in that action. The court found that "plaintiff's claims against Munoz and L & C were so meritless as to be brought in bad faith" and it imposed $79,513.60 in attorneys fees against Dombroski's client. Although the court declined to sanction Dombroski personally, his role in *Bulgo* contributed to the court's finding in *this* case that "monetary sanctions alone are not fully effective in deterring Dombroski from

sanctionable conduct." In its May 9, 1988 order, the court also found that the magistrate had sanctioned Dombroski in an unrelated case. The court found that the magistrate's order was not clearly erroneous and contrary to law and affirmed the same. *Maisonville v. F2 America, Inc.*, Civ. No. 87-0521 (D. Hawaii May 9, 1988).

Dombroski's conduct in these cases illustrates a pattern of utter disregard for the ethical standards set forth in the federal rules and in the disciplinary rules of the bar. The court will not permit attorneys licensed to practice before it to engage in such a pattern of conduct. *Cf. In re Disciplinary Action Boucher*, 837 F.2d 869, 871 (9th Cir. 1988), *modified*, No. 86-6591, slip op. (9th Cir. June 30, 1988). To the extent that its May 9, 1988 order did not make this clear, the court hereby amends the same to incorporate the above observations.

The application for stay of suspension is DENIED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii,

/s/ HAROLD M. FONG
United States District Judge

APPENDIX E

Order of the District Court Granting Motion to Remand Case to Circuit Court of the Second Circuit of Hawaii

(Filed July 10, 1987)

CIVIL NO. 83-1363

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

GEORGE PEABODY, CITIZENS RIGHT OF WAY DEDICATION AT PUKOO COMMITTEE,
Plaintiffs,

vs.

MAUD VAN CORTLAND HILL SCHROLL TRUST, et al.,
Defendants.

ORDER GRANTING MOTION TO REMAND CASE FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII TO THE CIRCUIT COURT OF THE SECOND CIRCUIT, STATE OF HAWAII

Plaintiff's Motion to Remand Case from the United States District Court for the District of Hawaii to the Circuit Court of the Second Circuit, State of Hawaii came on for hearing before this court on June 19, 1987. Boyce Brown, Jr. and Lynn Merrick appeared on behalf of plaintiffs; James Dombroski appeared on behalf of

defendants Maud Van Cortland Hill Schroll Trust; Gary Phillips appeared on behalf of defendants August K. and Sophie M. Duvachelle; and Derwin Hayashi appeared on behalf of defendant State of Hawaii. The court, having reviewed the motion and the memoranda in support thereof and in opposition thereto, having heard the oral arguments of counsel, and being fully advised as to the premises herein, finds as follows:

Defendant Maud Van Cortland Hill Schroll Trust ("Schroll Trust") is the owner of four parcels of real property located at Pukoo, Molokai, Hawaii. One of the parcels encompasses the former Pukoo Fish Pond.

Between 1971 and 1973, Canadian-Hawaiian Developers, a joint venture of the then fee owners, dredged and filled the former Pukoo Fish Pond as well as adjacent state-owned submerged lands to create a cloverleaf-shaped lagoon with a channel to the lagoon. This cloverleaf-shaped lagoon and channel is referred to as "Pukoo Lagoon."

The dredging and filling of Pukoo Fish Pond was done pursuant to DA Permit No. 969 issued by the Honolulu District Engineer, U.S. Army Corps of Engineers on June 30, 1971. DA Permit No. 969 provides in part that:

> (k) That no attempt shall be made by the permittee to forbid the full and free use by the public of all navigable waters at or adjacent to the structure or work authorized by this permit.
>
> (q) That all provisions of this permit shall be binding on any assignee or successor in interest of the permittee.

On September 21, 1983, plaintiffs brought an action in the Second Circuit Court of the State of Hawaii against Schroll Trust, State of Hawaii, August K. Duvachelle, and Sophie Duvachelle.

On December 12, 1983, Schroll Trust filed its petition to remove this case from state court to the federal district court.

On November 5, 1985, the court issued a written order denying Schroll Trust's Motion to Dismiss. In that order, the court found that plaintiffs had standing to bring this cause of action. The court also held that plaintiffs had a private cause of action against defendants for violations of the Clean Water Act, 33 U.S.C. §1344.

Plaintiffs have brought a motion to remand this case to the state circuit court. Plaintiffs argue that remand is appropriate in this case, because this court has no subject matter jurisdiction as there is no federal question in this lawsuit.

28 U.S.C. §1441(a) provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

The district court must remand the case if it finds that it has no jurisdiction. 28 U.S.C. §1441(c). The court cannot waive the issue of jurisdiction as Schroll Trust urges. If the court has no jurisdiction, it cannot decide this action. The only thing that the court may waive is a defect in the removal petition. Here, the challenge is not the removal petition but to jurisdiction itself.

Whether this court has jurisdiction over the instant case will be determined by reference to the allegations of the complaint, within the confines of the "well-pleaded complaint" rule. *Hunter v. United Van Lines*, 746 F.2d 635, 639 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 106 S. Ct. 180 (1985). An order remanding a case to the state court is not reviewable on appeal or otherwise. 28 U.S.C. §1447(d).

Count I of the complaint alleges that Schroll Trust, in violation of and contrary to the terms of subparagraph (k) of the permit, has in the past and continues to exclude plaintiffs from the navigable waters within the Pukoo Lagoon. In Count I, plaintiffs seek an injunction directing Schroll Trust to cease and desist its denial of full and free use of Pukoo Lagoon's waters by the public.

Count II of the complaint seeks a mandatory injunction directing Schroll Trust to provide two public rights of way to the beach as required by conditions attached to the Conservation District Use Permit issued by the State of Hawaii and the conditions attached by the Molokai Advisory Committee and the Maui Planning Commission in approving zoning changes for the property. The court sees no federal question in Count II.

Count III seeks to quiet title to a roadway, or in the alternative, to establish a public easement acquired by prescription. Defendants State of Hawaii and August and Sophie Duvachelle were named in the complaint solely because of their ownership of a portion of the real property on which the roadway in issue lies. As with Count II, the court likewise sees no federal question in Count III. Counts II and III can remain in this court as pendant state claims only if Count I constitutes a federal question that validates the removal of the case to federal court.

Removal jurisdiction was premised upon 33 U.S.C. §§1344 and 403. Section 1344 is found in Chapter 26 of Title 33 of the United States Code. Chapter 26 is entitled Pollution Prevention. Section 1251 states that the objective of Chapter 26 is to restore and maintain the chemical, physical and biological integrity of the nation's waters. Section 1344 sets forth special criteria for ocean disposal of pollutants and requires that a permit be obtained prior to discharging dredged or filled material into navigable waters at specified sites.

Plaintiffs argue that this action does not involve the discharge of pollutants at specified sites. Section 1344 is not plead [*sic*] in plaintiffs' complaint nor is it mentioned in DA Permit 969. Plaintiffs argue that §1344 is not relevant to this action; therefore, it cannot constitute a basis for removal of this lawsuit.

Based upon the court's review of plaintiffs' complaint, the court agrees that this action does not concern the discharge of dredged or filled material into navigable waters. Nothing has been plead [*sic*] in the complaint with regard to the discharge of pollutants in navigable waters. Therefore, 33 U.S.C. §1344 does not constitute a basis for jurisdiction by this court.

33 U.S.C. §403 provides that:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans

> recommended by the Chief of Engineers and authorized by the Secretary of the Army; and *it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army* prior to the beginning of the same.

(Emphasis added).

The point of contention in the instant motion is whether the case at bar "arises under" 33 U.S.C. §403. Section 403 prohibits the creation of obstructions in navigable waters and makes it unlawful to dredge or fill in navigable waters without a permit from the Corps of Engineers. The court's review of the complaint indicates that pursuant to 33 U.S.C. §403, DA Permit 969 was issued to Schroll Trust's predecessor-in-interest to permit the dredging and filling of parts of Pukoo Pond. Plaintiffs seek to enforce a condition of that permit.

The validity of §403 is not at issue. The issuance of the dredge and fill permit pursuant to §403 is not at issue. The construction and interpretation of §403 are not required to resolve this issue. The court therefore finds that the incidental relationship of §403 to this action is not sufficient to create a federal question.

Whether or not §403 creates a private right of action is a defense that can be raised by defendants. That defense should be addressed by the court vested with the proper jurisdiction, which is not this court.

The fact that a petition for removal makes reference to federal law does not mandate this court's assumption of jurisdiction unless the cause of action truly arises under federal law. In this case, the court finds that such is not the case. Plaintiffs having demonstrated that this court is without jurisdiction over the instant suit, the court will remand this action to the state circuit court.

Accordingly, IT IS HEREBY ORDERED that plaintiffs' Motion to Remand Case From the United States District Court for the District of Hawaii to the Circuit Court of the Second Circuit, State of Hawaii be, and the same is, GRANTED. The entire case will be remanded to the state court for its adjudication.

IT IS FURTHER ORDERED that the November 5, 1985 order entered by this court be VACATED AND SET ASIDE as having no application in this lawsuit since no claim has been plead [*sic*] by plaintiffs under the Clean Water Act and it is therefore not relevant to this case. Any prior ruling to the contrary in this lawsuit shall have no binding effect on the state court that has jurisdiction over this case.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, July 10, 1987.

/s/ HAROLD M. FONG
United States District Judge